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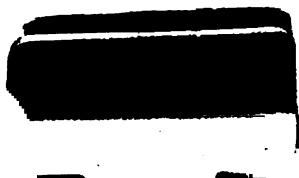
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DECISIONS
OF
THE DEPARTMENT OF THE INTERIOR
IN
APPEALED PENSION AND BOUNTY-LAND CLAIMS;
ALSO
A TABLE OF CASES REPORTED, CITED, OVERRULED,
AND MODIFIED,
AND OF
STATUTES CITED AND CONSTRUED

VOLUME XIV.
Edited by JOHN W. BIXLER.

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TABLE OF CASES REPORTED.

A.

	Page.
Alsup, Susan F., alias Bean (widow)	494
Andrews, Adeline (minor)	288
Andrews, Peter	413
Apgar, Martha (widow)	7
Armstrong, Jasper N	285, 420
Atherton, Jennie (widow)	554

B.

Ball, Robert H.	228
Barney, Wilson S	524
Bassett, Mary C., now Fleming (as minor sister)	489
Bell, Jas. R.	224
Bluford, John (minors of)	491
Boazman, Eliza (widow)	355
Bowman v. Bowman	120
Bowman, Jeremiah.	495
Boyd, Melissa (widow)	279
Brechbiel, Anthony J. (minor of)	114
Breezley, Eliza (widow)	442
Brown, Catharine A. (widow)	375
Brown, Eliza G. (widow)	106
Buck v. Buck	150
Bugbee, Carlos R. (widow of)	438
Burdette v. Burdette, alias Oakley	146
Burkhead, Jas. F. (minors of)	24
Burnham v. Burnham	191
Burns, Mary A. (widow)	199
Button and Strunk, Strunk v.	17
Byrd, Nancy (widow)	347
Byrns v. Byrns	404

C.

Calhoun, James (deceased)	152
Capper, Henry M	264
Carr, Wm. H	201
Carrier, Laura E. (widow)	300
Chambers, Patrick (father)	474
Churn, Peggy (alleged widow)	445
Claggett, Emily (widow)	84
Clark, Sarah, formerly Phillips (widow)	213

	Page.
Clarke v. Clarke.....	479
Coney, Patrick H. (attorney)	328
Connell, Wm	271
Cook, Jane (widow).....	426
Courtney, Edward T	518
Cralle, J. B., & (C. (attorneys).....	276
Crissey v. Crissey.....	334
Cummings, Anna E. (as widow).....	365
Curtis, Saml. T.....	298

D.

Daniels, Harriet (widow).....	434
Dasher, Mary (widow)	257
Davis, Maggie (widow).....	344
Davis, Margaret A. (widow).....	408
Demaree, Dottie May (sister)	4
Demo v. Demo	394
De Ortega, Placida M. (widow)	326
Dolan, Thos. J. (father)	294
Draper, Mary E. (widow)	456
Dudley, W. W., & Co. (attorneys)	186, 273

E.

Easter, Wm	172
Edington, Julia (as widow).....	362
Elliott v. Elliott.....	472
Ensor, Delbert H	81
Eveland, Daniel.....	40
Eveland, Eliza J. (widow)	141

F.

Fleming, Mary C., formerly Bassett (as minor sister).....	489
Fletcher, Wm., & Co. (attorneys).....	172

G.

Gamble, Charlotte (widow).....	156
Gee, Cora, now Stolworth (mother)	267
Goshorn, Elizabeth, formerly Vallean (widow)	411
Graziani, Mattie (widow).....	331
Griswold, Emaline S., now Lamb (widow)	111
Groner, Cornelius F	508

H.

Hanley, Wm.....	162
Heimkel, Jos	203
Heininger, Lewis (attorney)	269
Hendershott v. Hendershott	130
Herbert, Mary C. (widow).....	95
Hill, Camden L	57
Hofrichter, Maria Ann (widow).....	80
Hopkins, Frances (widow)	527
Hunter v. Hunter	136
Hyatt v. Hyatt.....	8
Hyatt, Frederick W	367

TABLE OF CASES REPORTED.

VII

I.

	Page.
Ingalls, Laura A. (widow)	198

J.

Johnson, Jno. L	296
Jones v. Jones	521

K.

Kane, Luther C.	328
Kelley, James H.	104
Kendell v. Kendell	159
King, Jonathan	466
Kite, Jno.	269
Kyle, Jas. T. (minors of)	186

L.

Lamb, Emaline S., formerly Griswold (widow)	111
Landon, Charles E.	83
Laraway, Annie E. (as widow)	212
Lawley, Lewis	13
Lester, Mazilla (as widow)	38
Lockard v. Lockard	45
Lutes, Nettie C. (widow)	281
Lynch, Garry W.	155

M.

Manson, Abbie M. (alleged widow)	349
Marshall, Mary J. (widow)	173
Marvin, Isaac	352
Mathers, Sarah, formerly Miller (widow)	318
Mechling, Henry C.	68
Medlock, Rebecca (widow)	422
Middleton, John	69
Miller, Sarah, now Mathers (widow)	318
Moer, Ellen A. (widow)	452
Morley v. Morley	230
Morman, Thos. J.	195
Morrill, Emma A. (widow)	310

N.

Noble, Mary E. (widow)	535
Nutt v. Nutt	338

P.

Parcell, Catherine (widow)	63
Parker, Chas. W.	388
Patrick, Allen J.	357
Perkins, Cyrus E. (attorney)	256
Phillips, Sarah, now Clark (widow)	213
Pitkin, Ruth A. (widow of Bugbee)	438
Plount, Edward (minor of)	428
Post v. Post	177

R.

	Page.
Rankins, Bettie (widow)	383
Rhodes, Wm. H	273
Ricketts, Jno. H	283
Robertson, Geo. P	364
Robinson, Amanda (widow of Taylor)	476
Robinson, Celia (widow)	537
Robinson, Lewis (widow of)	436
Rumsey, Hannah A. (widow)	290
Ryerson, Annie P. (widow)	497

S.

Shafer, Jno. B. (insane)	89
Shanaman, Amelia K. (widow)	530
Shay, Bridget (mother)	265
Schilling, Mary (widow)	417
Smedley, Mary E. (widow)	99
Smith, Jno. W	215
Smith, Mariah (widow)	346
Snyder, Annie (widow)	219
Stevens, Jno. C.	209
Stevens, Milo B., & Co. (attorneys)	228
Stolworth, Cora, formerly Gee (mother)	267
Strunk v. Button and Strunk	17
Stuart, Fanny (widow)	502
Sullivan, Emie (administratrix)	415

T.

Taylor, Amanda, now Robinson (widow)	476
Taylor, Annie (widow)	71
Taylor, Josefa (widow)	360
Taylor, Wm. P.	276
Thompson, Christie Ann (widow)	436
Thompson, Jennette (widow)	469
Thorn, Graham	249
Tripp, Annie L. (widow)	242

V.

Vallean, Elizabeth, now Goshorn (widow)	411
Veirs, John, alias William Dowdell	552
Vogler v. Vogler	385

W.

Walker, Isaac	256
Wardwell v. Wardwell	234
Washburn v. Washburn	127
Weems, James P. L. (attorney)	199
Wehr, Solomon F	515
Wheeler, George W	542
Whelan, Bridget (widow)	380

TABLE OF CASES REPORTED.

IX

	Page.
White v. White	313
White, Maria (widow)	21
Whitehurst, Oliver S	450
Wilde, Addie F. (widow)	506
Williams v. Williams	1
Willie v. Wilson, alias Willie	43
Wilson, alias Willie, Willie v	43
Winfield, Isabella (widow)	128, 194
Wormstead, William H.	182

TABLE OF CASES CITED.

A.		Page.			Page.
Abbot's Trial Evidence, 353		79	Barnes, William A. (22 L. D., 196)		196
"Abbotsford," The (98 U. S., 440)		34	Barnett v. Barnett (27 Ind. App., 471)		45, 180
Adams v. Adams (12 P. D., 370)		122,	Baughner, Thomas W., minors of (7 P. D.,		
		237, 371, 482	433)		24, 36
Adams v. Palmer (51 Me., 480)		351	Bean, Thomas (7 P. D., 527)		270
Adams, Elizabeth (12 P. D., 212)		429	Beatrice, Schmilseur v. (147 Ill., 210)		19, 45, 445
Adams, Moses (26 Fee P. L. B., 228)		275	Becher, Joseph (2 P. D., 109)		510
Afflerbach, John H. (11 P. D., 508)		257	Belgrade, Camden v. (78 Me., 204)		361
Agne, Matilda (9 P. D., 327)		88	Bergdall's Estate (7 D. R., 137 Pa.)		212
Alexander v. Alexander (140 Ind., 155)		413	Bertles v. Nunan (92 N. Y., 152)		385
Alexander v. United States (4 Ct. Cl., 218)		110	Beverlin v. Beverlin (29 W. Va., 723)		38
Alexander, United States v. (12 Wallace, 177)		34	Bigelow on Estoppel (p. 508)		108
American and English Encyclopedia of law:			Bird, Daniel (10 P. D., 104)		475
(1 ed. v. 1 pp. 2 (n)		108	Bishop on Marriage and Divorce (sec. 513)		248
		212			(sec. 457)
		337, 942, 943			356
8: 556		161	Bishop on Marriage, Divorce, and Separation		
11: 160		87	(sec. 956)		156
15: 445		193	Bishop, Frank, Jr. (8 P. D., 459)		364
17: 325, 328		381	Blaisdell, William (18 P. D., 465, 479)		562
25: 1019		356	Blasini et al. v. The Succession of Blasini		
28: 531 (n)		96	(30 La. An., 1868)		345
2 ed. 5: 883		108	Byers, Dunlap v. (110 Mich., 109)		232
9: 736		342	Byrnes v. United States (26 Ct. Cl., 302)		516
		768	Byrns v. Byrns (14 P. D., 404)		489
		773	Boeke, May E. (1 P. D., 427)		89
		783	Bone, Wallace G. (2 P. D., 310)		324
15: 670		408	Borthwick, Chas. F., alias Franklin Brown		
		875, 377 (n. 1)	(10 P. D., 249)		250, 324
19: 1207, 1209		140	Boston, Marden v. (155 Mass., 359)		441
Amos, George W. (8 P. D., 271)		235	Bowles, Harvey E. (10 P. D., 133)		515
Anderson v. Watt (138 U. S., 706)		324	Bowman v. Bowman (14 P. D., 120)		237, 317, 373
Andre v. State (5 Iowa, 389)		406	Boyd, Melissa (14 P. D., 279)		292
Archambault, Syprian (6 P. D., 240)		342	Bram, Zerntlien v. (100 N. Y., 12)		386
Ashley v. Ashley (18 P. D., 206)		196	Brewster, Amelia L. (7 P. D., 296)		329
Askey, Huddleston v. (56 Ala., 218)		139, 387	Brice's Estate (2 W. N. C., 112 Pa.)		212
Assistant Attorney-General (6 P. D., 296)		35	Briggs v. Briggs (24 S. Car., 377)		46
Attorney-General (4 Op. 70		153	Briggs, Davie v. (98 U. S. Repts., 535)		444
		366	Brobet v. Brobet (13 P. D., 218)		233, 240
7: 149		110	Brogunier, Elizabeth (9 P. D., o. s., 250)		117
		717	Bronson, Hammick v. (5 Day, 290)		470
17: 192)		110	Brower v. Brower (1 Abb., Ct. App., 214)		20, 179
		37	Brown, Jones v. (2 Ex. Reports, Wellsby,		
			Hurlstone, Gordon, 329)		35
			Brown v. McGee (12 Bush, 428)		475
			Brown, Minor v. (133 N. Y., 308)		386
			Brown, Eliza G. (13 P. D., 188)		106
			Brown, George M. (3 P. D., 29)		207
			Brown, Isaac P., alias Albert B. Cole (14 P. D.,		
			375)		468
			Brown, John (8 P. D., o. s., 60)		507
			Brown, Minerva (11 P. D., 266)		438
			Bruner, Bernard (3 P. D., 228)		307

B.

Bailey, Illingsworth v. (33 Ill. Ap., 394)		295
Bailey, David J. (7 P. D., 173)		410, 495
Baker, People v. (76 N. Y., 78)		176
Baker, William A., sister of (9 P. D., 504)		489
Banks, Griffin v. (24 How., 215)		20, 179
Barker v. Valentine (125 Mich., 336)		555
Barleyoung, John (7 P. D., 453)		75

	Page.		Page.
Buck v. Buck (14 P. D., 150).....	339	Commonwealth v. Thompson (11 Allen, 23).....	441
Budington v. Munson (33 Conn., 481).....	470	Commonwealth Ins. Co., Claflin and others	
Bullock v. Bullock (122 Mass., 3).....	466	v. (110 U. S., 81).....	34
Burdette v. Burdette (14 P. D., 146).....	233	Comstock, Harriet (10 P. D., 220).....	555, 557
Burnham, Cram v. (5 Me., 213).....	351	Conover v. Conover (11 P. D., 525).....	369
Burnham, John (4 P. D., 93).....	324	Cook v. Cook (114 Mass., 163).....	440
Burton, Jennette (9 P. D., 31).....	19, 45, 483	Cooper v. Cooper (17 Mich., 502; 97 Am.	
Bush, Sarah (9 P. D., 144).....	380	Dec., 182).....	54
Butler, Jeremiah (7 P. D., 214).....	74, 78	Cooper v. Cooper (13 P. D., 208).....	233
Button and Strunk, Strunk v. (14 P. D., 17).....	233, 240	Cotton, Walton v. (19 How., 355).....	109
C.		Cowan, Franklin S. (7 P. D., 374).....	78
Cady, W. S. (5 P. D., 84).....	451	Craig, Mary W. (13 P. D., 259).....	105, 424, 427
Caldwell, Davenport v. (10 S. C., 317).....	538	Craiglow, Martha J. (7 P. D., 517).....	329
Calef, Commonwealth v. (10 Mass., 153).....	87	Cralle & Co., J. B., attorneys (5 P. D., 84).....	451
Calvert, Floyd v. (53 Miss., 87).....	478	Cram v. Burnham (5 Me., 213).....	351
Camden v. Belgrade (78 Me., 204).....	351	Crane, Joseph (4 P. D., 358).....	280
Campbell, Mark G. (3 P. D., 203).....	111	Croft, Simon v. (182 U. S., 427).....	474
Carpenter v. Carpenter (30 Kans., 712; 46 Am.		Croft, Sarah (1 P. D., 279).....	113
Rep., 108).....	401	Cropsey v. McKinney (30 Barb., 47-55).....	20, 179
Carpenter, Alfred (11 P. D., 429).....	451	Crume v. Crume (13 P. D., 424-427).....	150
Carter v. Carter (28 Me., 509).....	351	Cummings, William H. (1 P. D., 351).....	118
Cassin, John H. (2 P. D., 376).....	517	Cunningham v. Irwin (7 Sergt. and Rawle,	
Cast v. Cast (1 Utah, 112).....	102	247).....	140
Certain, Bates T. (13 P. D., 413).....	83	Cunningham, Leckey v. (56 Pa. St., 370).....	193
Chamberlain v. Chamberlain (74 N. Y., 423).....	249	Curran, Jno. W. (5 P. D., 1).....	284
Chambers, Simon P. (6 P. D., 260).....	253, 254, 392	D.	
Chandler, John M. (4 P. D., 276).....	308	Dalley, Daniel (4 P. D., 337).....	308
Charnbury, executors of, Powers v. (35 La.		Daily v. United States (17 Ct. Cl., 144).....	110
An., 630).....	345	Dana, Diana M. (13 P. D., 272).....	156
Chase v. Webster (168 Mass., 228).....	440	Daniel v. Sams (17 Fla., 487).....	384
Cheever v. Wilson (6 D. C., 149).....	161	Daniel v. Simms (49 W. Va., 554).....	34
Cheever v. Wilson (76 U. S., 123).....	407	Dasher, Mary (14 P. D., 257).....	393
Chollar, Caroline (4 P. D., 103).....	214	Daugherty v. Daugherty, alias Doherty (13	
Christopher v. Christopher (13 P. D., 388).....	184, 340	P. D., 302).....	123, 140
Church-Peterson on Nervous and Mental		Davenport v. Caldwell (10 S. C., 317).....	538
Diseases:		Davidson, Christopher P. v. United States	
(p. 391).....	544	(21 Ct. Cl., 298).....	2
(p. 415).....	545	Davie v. Briggs (98 U. S. Reports, 585).....	444
(p. 421, 422, 423, 424).....	545	Davis v. Davis (2 Den., N. Y., 549).....	176
Claflin and others v. Commonwealth Ins.		Davis v. Davis (10 P. D., 236).....	336
Co. (110 U. S., 81).....	34	Davis v. Davis (10 P. D., 403).....	135
Claw, Jackson v. (18 Johns., 346).....	249	Davis, Fox v. (113 Mass., 255).....	440
Clayton v. Wardell (4 N. Y., 230).....	249	Davis, Offield v. (40 S. E. Rep., 910).....	447
Clement v. Riley (33 S. C., 66).....	538, 539	Davis, William N. (7 P. D., 333).....	250, 253, 392
Clements, Isaac, pension agent (5 P. D., 328).....	154	Da ya ne Ah Kee la nee gar (10 P. D., 146).....	200
Cleveland, Hunt v. (6 Pa. C. C., 592).....	213	Dennis, Annie (9 P. D., 243).....	45
Cleveland, Andrew B. (12 P. D., 17).....	257	Dennison v. Dennison (35 Md., 361).....	348
Clevenger on Medical Jurisprudence of In-		Derhammer, Anna (16 Fee P. L. B., 362).....	274
sanity (v. 1, p. 393).....	193	Divoll v. Leadbetter (21 Mass., 220).....	471
Clive, William (7 P. D., 119).....	511	Dodge, Miller v. (28 N. Y., Misc., 238).....	179
Coal Run Company v. Jones (127 Ill., 379).....	45	Doherty v. Doherty (13 P. D., 302).....	57
Coffee, Flynn v. (12 Allen, 133).....	441	Donnelly v. United States (17 Ct. Cl., 105).....	110
Cole v. Cole (153 Ill., 565).....	45	Doolittle v. Doolittle (78 Iowa, 691-694).....	394
Coleman, William (8 P. D., 450).....	229	Drew, Kelly v. (12 Allen, 107).....	441
Collins, Jackson v. (2 Houston, 128).....	528	Dudley, W. W. (6 P. D., 208).....	62
Collins, Amy (12 P. D., 292).....	179	Dunlap v. Byers (110 Mich., 109).....	232
Colvin v. Reed (53 Pa. State Reps., 875).....	161, 489	Durley, Albert (29 Fee P. L. B., 436).....	229
Commonwealth v. Calef (10 Mass., 153).....	87	Dustin v. Dustin (13 P. D., 77).....	57, 123, 189
Commonwealth v. Elwell (2 Met., 190).....	180	Duval, James (9 P. D., 218).....	324
Commonwealth v. Harley (14 Gray, 411).....	465	E.	
Commonwealth v. Hayden (1895) (163 Mass.,		Easley, Daniel M. (12 P. D., 179).....	323
453).....	465	Eastridge, Mary E. (8 P. D., 5).....	324
Commonwealth v. Johnson (10 Allen, 196).....	465	Eispenozer, State v. (20 Nev., 209).....	394
Commonwealth v. Munson (127 Mass., 459).....	462	Eldred v. Eldred (97 Va., 606).....	443
Commonwealth, The, Pruner v. (10 Va. Law			
J., 520).....	247		

	Page.
Eldred, Williamsport v. (84 Pa. St., 429).....	489
Ellis v. Ellis (11 P. D., 288).....	369
Ellis, Eliza J. (12 P. D., 159).....	348, 446
Ellwell, Commonwealth v. (2 Met., 190).....	140
Endlich on Interpretation of Statutes:	
secs. 127, 340.....	110
367.....	34
Ensinger, John (13 P. D., 248).....	105, 424
English, Erwin v. (61 Conn., 602).....	356
Erwin v. English (61 Conn., 602).....	356
Eveland, Daniel (14 P. D., 40).....	422
Eveland, Eliza J. (14 P. D., 141).....	325
Everett v. Morrison (69 Hun., 146).....	471
Everman, Samuel (1 P. D., 418).....	196
Eureka (4 Sawyer, 217, 302).....	98
Ewing, Richard (8 P. D., 44).....	2

F.

Farrell, Edward et al. (7 P. D., 532).....	75, 346
Ferguson, Eugenie M. (387 L. B., 438).....	97
Finley, William (11 P. D., 410).....	2
Fisher v. Fisher (12 P. D., 336).....	123, 139, 387
Fisher, Hiles v. (144 N. Y., 306).....	386
Fishli v. Fishli (2 Litt. Ky., 837).....	46
Fleck, George W. (7 P. D., 343).....	393, 415
Fleener, Andrew J. (9 P. D., 133).....	308
Fletcher's Equity Pleading and Practice,	
pp. 591 and note 93, 714 and note 87.....	148
Floyd v. Calvert (53 Miss., 37).....	478
Flynn v. Coffee (12 Allen, 133).....	441
Forbin v. Forbin (13 P. D., 120).....	19, 45, 233, 240
Foster v. Hawley (8 Hun., 68, 72).....	249
Fox v. Davis (113 Mass., 256).....	440
Fox v. State (3 Tex., 329).....	180
Frank, Samuel D. (13 P. D., 362).....	512
Freeman on Judgments (v. 1, sec. 271).....	134
Fritsche, Caroline (8 P. D., o. s., 196).....	24
Fuller, Sally A. (10 P. D., 238).....	305

G.

Gabriel, Francoise (12 P. D., 382).....	345
Gall v. Gall (114 N. Y., 109).....	20, 179, 366
Garnett v. Garnett (114 Mass., 347).....	440
Gaskell, Lucinda (3 P. D., 87).....	552
Geddings, Esther (36 Fee P. L. B., 374).....	189
Gembe, Mary (13 P. D., 131).....	291
Germain, Louise C. (11 P. D., 66).....	433
Gibbs, Hultz v. (66 Pa. St. Rep., 360).....	161
Gillespie, John, minors of (13 P. D., 290).....	105, 110
Gilliland, Mary J. (13 P. D., 90).....	158, 357, 433
Glanbenslee v. Low (29 Ill. Ap., 408).....	295
Gleason, John H. (2 P. D., 106).....	325
Goldenburg, United States v. (168 U. S., 95).....	554
Graves v. Graves (108 Mass., 314-320).....	440
Graves, James R., minor of (13 P. D., 148).....	7, 431, 434
Gray, Alice (7 P. D., 134).....	84
Green, United States v. (98 Fed. Rep., 63).....	19, 235
Green, Ann (12 P. D., 306).....	18, 179, 366
Greenleaf on Evidence, v. 1, secs. 34, 35.....	154
41.....	79, 342
48 (n.).....	76
Griffin v. Banks (24 How., 215).....	20, 179
Griffin, Margaret (11 P. D., 282).....	392
Groft v. Groft (76 Ind., 136).....	413
Grooms, Sarah J. (7 P. D., 207).....	88, 247
Grove v. The City of Rochester (148 N. Y.,	
235).....	346
Guthrie, Michael (40 Fee P. L. B., 299).....	173

H.

Hackey, William (7 P. D., 212).....	333
Hallett, Emma J. (13 P. D., 31).....	110
Ham, Myers v. (20 S. C., 522).....	539
Hammick v. Bronson (5 Day, 290).....	470
Hardenberger v. Hardenberger (14 Cal., 654).....	406
Hardy, Callista M. (7 P. D., 391).....	330
Harley, Commonwealth v. (14 Gray, 411).....	465
Harris v. Harris (8 Brad., App. Rep., 57).....	45
Harris v. Harris (8 Ill. App., 57).....	445
Harris v. Harris (12 P. D., 7).....	336
Harrison, James E. (7 P. D., 97; 9 P. D., 433).....	118
Hasey, Myrick v. (27 Me., 17).....	35
Hawksley, James H. (6 L. B. P.).....	24, 32
Hawley, Foster v. (8 Hun., 68, 72).....	249
Hayden, Commonwealth v. (163 Mass., 458).....	465
Hayden, Sarah C. (8 P. D., 364).....	213, 419
Hayes v. Hayes (13 P. D., 212).....	387
Helmer, Henry A. (7 P. D., 376).....	507
(9 P. D., 130).....	118
Hendee v. The United States (124 U. S., 809).....	516
Hendershott v. Hendershott (14 P. D., 130).....	401, 523
Hervey, Parton v. (67 Mass., 119).....	459
Hetherington, Anna (10 P. D., 355).....	326
Higgins, Annie (11 P. D., 519).....	201
Hiles v. Fisher (144 N. Y., 306).....	386
Hill, John J. (7 P. D., 142).....	552
Hitchcock (2 W. Va., 435).....	39
Hogg v. Hogg (13 P. D., 206).....	474
Holmes v. Holmes (6 La., 463).....	345
Horton, Stephen (7 P. D., 369).....	308
Houston, Yates v. (3 Tex., 433).....	159
Howard, Harriet D. (13 P. D., 448).....	283
Howell, Rebecca C. (12 P. D., 300).....	213
Hoyt, Birney (1 P. D., 70).....	324
Huber, Albert (8 P. D., 80).....	329
Huddleston v. Askey (56 Ala., 218).....	85
Hudson v. King (23 Ill. App., 118).....	295
Hughes, Annie (8 P. D., 455).....	538
Hughes, William H. (9 P. D., 152).....	427
Hultz v. Gibbs (66 Pa. St. Rep., 360).....	161
Human, Jefferson M. (12 P. D., 500).....	76, 256, 285, 392
Hunt's Appeal (86 Pa. St., 294).....	213, 419
Hunt v. Cleveland (6 Pa. C. C., 592).....	213
Hunt, Lucy (9 P. D., 160).....	489
Hunter v. Hunter (14 P. D., 136).....	234, 385, 387, 404
Huntingdon, Teere et al. v. (22 How., 2).....	342
Hutchins v. Kimmell (13 Mich., 126).....	555
Hyatt v. Hyatt (14 P. D., 8).....	120, 128, 240, 370
Hyatt, Frederick W. (14 P. D., 367).....	482
Hynes v. McDermott (91 N. Y., 451).....	249

I.

Illingworth v. Bailey (33 Ill. App., 394).....	295
Indiana, Adjutant-General's Reports (v. 1,	
p. 74).....	382
Inhabitants of Twinning, King v. (2 B. and	
Ald., 386).....	356
Instructions to Commissioner of Pensions:	
(7 P. D., 240).....	74
(9: 93).....	435
(10: 465).....	24
Irwin, Cunningham v. (7 Sergt. and Rawle,	
247).....	140

J.

Jackson v. Claw (18 Johns., 346).....	249
Jackson v. Collins (2 Houston, 125).....	528

	Page.		Page.
Jackson v. Jackson (80 Md., 176)	538	Loring v. Steineman (1 Met., 204).....	441
Jackson v. King (4 Cowen, 207)	198	Loring v. Thorndike (5 Allen, 257)	460
Jackson v. Van Dusen (5 Johnson, 144).....	198	Lott, Catherine (5 P. D., 382).....	333
Jacob, George (7 P. D., 39).....	70	Loughry v. Loughry (11 P. D., 523).....	370
Jacobson v. Miller (41 Mich., 90).....	232	Low, Jesse (3 P. D., 187).....	308
Jenkins, Newman v. (10 Pick., 515).....	441	Love, Glanbensklee v. (29 Ill. Ap., 408).....	295
Johns, Wm. B. (2 P. D., 393).....	327	Lowe, White v. (1 Redf., 376).....	20, 179
Johnson, Commonwealth v. (10 Allen, 196).....	465	Luckingbeal, Judith S. (9 P. D., 42).....	435
Johnson v. Johnson (111 Ill., 611)	46, 444	Lynch v. Lynch (13 P. D., 447).....	233
Johnson v. Johnson (1 Cold., 626).....	471	Lynch, G. W. (14 P. D., 155).....	287
Johnson v. Johnson (45 Mo., 595).....	492		
Johnson, George (13 P. D., 46).....	393	M.	
Johnson, Gus (8 P. D., 463).....	474, 476	McCabe, Rosinda (5 L. B. P., 273).....	117
Jones v. Brown (2 Ex. Reports, Wellsby, Hurlstone, Gordon, 329).....	35	McCutchen v. McGahay (11 Johnson, 281) .	140
Jones, Coal Run Company v. (127 Ill., 379) ..	45	McDermott, Hynes v. (91 N. Y., 451)	249
Jones v. Zoller (29 Hun., 561).....	20, 179	McElroy, Alexander P. (9 P. D., 401).....	526
Jones, Moses G. (39 Fee P. L. B., 251).....	229	McGahay, McCutchen v. (11 Johnson, 281) .	140
Joyce, Olivia (7 P. D., 157).....	274	McGe, Brown v. (12 Bush, 428).....	475
K.		McKee, Thos. W. (6 P. D., o. s., 83).....	507
Kelley, James H. (14 P. D., 104).....	423	McKinney, Cropsey v. (30 Barb., 47).....	20, 179
Kelly v. Drew (12 Allen, 107).....	441	McNealy, Henrietta J. (14 Fee P. L. B., 62) .	189
Kelly v. Kelly (18 Nev., 49).....	402	McNell, Mary E. (3 P. D., 26).....	507
Kendall v. Kendall (14 P. D., 159).....	407, 489	McPherson, William J. (5 P. D., o. s., 47)....	82, 507
Kennedy v. Kennedy (87 Ill., 250).....	150	Mahone v. Mahone (19 Cal., 626; 81 Am. Dec., 91).....	51
Kent, Fredericka (10 P. D., 211).....	77, 429	Mangue v. Mangue (1 Mass., 240).....	457
Kenyon v. People (26 N. Y., 203).....	343	Marden v. Boston (155 Mass., 359).....	441
Kilbee, Rebecca (10 P. D., 286).....	88	Markwood, Robert (11 P. D., 380).....	40, 155, 420
Kilburn, Williams v. (88 Mich., 279).....	555	Marshall, James M. (8 P. D., 395).....	324
Kilmer v. Kilmer (13 P. D., 270).....	372, 482	Marsteller, Jas. F., minor of (11 P. D., 55)....	118
Kimball, Williams v. (35 Fla., 49).....	384	Martin v. Martin (13 P. D., 430).....	55, 143, 403
Kimmell, Hutchins v. (13 Mich., 126).....	555	Martin, Jackson (7 P. D., 265).....	324
King's Estate (9 Kulp., 54).....	212	Marvin, State v. (12 Iowa, 499).....	87, 246
King, Hudson v. (23 Ill. Ap., 118).....	296	Mason v. Mason (101 Ind., 25).....	471
King v. Inhabitants of Twining (2 B. and Ald., 386).....	356	Mason, Harrison H. (4 P. D., 244).....	511
King, Jackson v. (4 Cowen, 207).....	193	Mathews, ex parte (22 Ala., 51).....	34
King, Turner v. (98 Ky., 253).....	342	Mavly, John H. (446 P. L. B., 404).....	270
Kite, Alfred (9 P. D., o. s., 232).....	325	Medley v. Medley (12 P. D., 490).....	316
Klein v. Laudman (29 Mo., 259).....	501	Meese, Oscar (5 P. D., 122).....	135
Knoop, C. F. (8 P. D., 435).....	133	Meister v. Moore (96 U. S., 76, 78).....	449, 460
Knowles, Northrop v. (52 Conn., 522).....	470	Melvin, Daniel V. (8 P. D., 89).....	118
Knox v. Moore (41 S. C., 355).....	539	Mendon, Rutland v. (1 Pick., 156).....	34
Koch, United States v. (21 Fed. Rep., 873) ..	135	Mercer v. Mercer (114 Ind., 558).....	47
Krause, Anna S. (3 P. D., 243).....	118	Meyers v. Pope (110 Mass., 314).....	461, 464
L.		Millbourn, Chalkley, alias T. C. (2 P. D., 36) .	208
Lake, Louis S., widow of (2 P. D., 111).....	325	Milford v. Worcester (7 Mass., 48).....	458, 460, 463
Lamb, John E. (8 P. D., 191).....	70	Miller v. Dodge (28 N. Y., Misc., 238).....	179
La Mountain, John (11 P. D., 395).....	153	Miller, Jacobson v. (41 Mich., 90).....	232
Larned, Charles H. (7 P. D., 162).....	330	Miller, State v. (3 Pennnewill, 518).....	528
Laudman, Klein v. (29 Mo., 259).....	501	Miller, Christian (4 P. D., 351).....	511
Lawley, Lewis (11 P. D., 13).....	297, 299	Miller, Josiah C. (27 Fee P. L. B., 382).....	229
Lawrence v. Nelson (85 N. W. Rep., 84).....	110	Miner, Lydia A. (8 P. D., 104).....	136
Lea v. Lea (99 Mass., 493).....	130, 134	Minor v. Brown (133 N. Y., 308).....	386
Leadbetter, Divoll v. (21 Mass., 220).....	471	Minor, Susan M. (8 P. D., 263).....	427
Leekey v. Cunningham (56 Pa. St., 370).....	193	Mitchell v. United States (88 U. S., 352).....	407
Lee, William G. (6 P. D., 149).....	421	Mohrstadt, Moffatt (5 Cal., 281).....	406
Leighton, Catharine S. (7 P. D., 88).....	329	Mohrstadt, John C. (8 P. D., 413).....	8
Leslie, Helen M. (6 P. D., 255).....	327	Monroe, Elizabeth (3 P. D., o. s., 282).....	449
Lester, Mary N. (12 P. D., 340).....	178, 366	Montgomery, Rudolph M. (3 P. D., 41).....	307
Limoges, Adolphus (9 P. D., 274).....	508	Moore, Knox v. (41 S. C., 365).....	539
Livengood v. Livengood (13 P. D., 134).....	316	Moore, Meister v. (96 U. S., 76).....	449, 460
Lockard v. Lockard (14 P. D., 45).....	130, 134	Moore, United States v. (95 U. S., 760, 763) ..	98
Lockhart v. White (18 Tex., 102).....	159	Moore, William (12 P. D., 87).....	

	Page		Page
Morrison, Everett v. (69 Hun., 146).....	471	Potter, Joseph M. (3 P. D., 82).....	307
Mouat v. The United States (124 U. S., 303) ..	516	Potts-Gallaudet, Nervous and Mental Dis-	
Mulick, John G. (12 P. D., 186).....	79	eases:	
Munson, Budington v. (33 Conn., 481).....	470	(p. 225).....	544
Munson, Commonwealth v. (127 Mass., 459) ..	462	(p. 426, 430).....	546
Murphey, James (42 Fee P. L. B., 358).....	229	Powers v. Executors of Charnbury (35 La.	
Myers v. Ham (20 S. C., 522).....	539	Ann., 630).....	345
Myrick v. Hasey (27 Me., 17).....	35	Protector, The (12 Wall., 700).....	78
N.		Pruitt, John (9 P. D., o. s., 295).....	118
Nelson, Lawrence v. (85 N. W. Rep., 84).....	110	Pruner v. The Commonwealth (10 Va. Law	
Newman v. Jenkins (10 Pick., 515).....	441	J., 520).....	247
Newman, Henry (8 P. D., 532).....	118	Pulver, Jonas W., minors of (10 P. D.,	
Newman, Robert (6 P. D., o. s., 228).....	117	227).....	429, 434
Newton v. Southworth (7 N. Y., 130).....	248	R.	
Nicholas, Mary, widow of Francis Wallace		Randall v. Randall (13 P. D., 411).....	122
(13 P. D., 286).....	110	Ranlett, Potter v. (116 Mich., 454).....	233
Nichols, Betty F. (13 P. D., 330).....	76, 346	Rathton, Nancy (9 P. D., 162).....	259, 263, 393
Nix, Jacob (4 P. D., o. s., 260).....	250	Rebenstorf, Christenia, gdn. minor of John	
Nook, Samuel (8 P. D., 367).....	552	(15 P. D.).....	434
North, United States v. (112 U. S., 510).....	327	Redgrave v. Redgrave (38 Md., 97).....	349
Northey, Snow v. (19 L. D., 493).....	196	Reed, ex parte (100 U. S., 13).....	516
Northrop v. Knowles (52 Conn., 522).....	470	Reed, Colvin v. (55 Pa. St., 375).....	161, 489
Norton, John (9 P. D., 382).....	326	Rich, Mollie (4 P. D., 234).....	500
Numan, Bertles v. (92 N. Y., 152).....	385	Richards v. Richards (11 P. D., 90).....	372, 482
Myland, Cornelia A. (3 P. D., o. s., 256).....	24, 33	Richardson v. Smith (80 Md., 189).....	532
O.		Richardson, Martin V. B. (1 P. D., 373) ..	511, 514
Offield v. Davis (40 S. E. Rep., 910).....	447	Riley, Clement v. (33 S. C., 66).....	588, 539
Ollendorf, Louis, minors of (8 P. D., 272) ..	200	Robinson, John S. (11 P. D., 390).....	393
Ott, Catherine (4 P. D., 47).....	118	Rochester, the city of, Grosse v. (148 N. Y.,	
P.		235).....	386
Parcell, Catherine (13 P. D., 450).....	63	Rothery v. Rothery (11 P. D., 77, 377) ..	45, 55, 130, 134
Parker v. Parker (13 P. D., 233).....	57, 123, 136, 140	Rothery, Henry N. (11 P. D., 255).....	372, 482
Parker, State v. (96 Mo., 383).....	342	Ruch, Louis (1 P. D., 390).....	325
Parker, Mary E. (11 P. D., 103).....	118	Rudd v. Rudd (33 Mich., 101).....	134
Palmer, Adams v. (51 Me., 480).....	351	Ruddick, Lindley (10 P. D., 217).....	118
Parton v. Hervey (67 Mass., 119).....	459	Rumsey, Hannah A. (14 P. D., 290).....	456
Passons, Andrew J. (8 P. D., 416).....	105	Rundle v. Pegram (49 Miss., 751).....	478
Payne, Wilkinson v. (4 Term R., 468).....	471	Rutland v. Mendon (1 Pick., 155).....	34
Peet v. Peet (52 Mich., 464).....	555	S.	
Pegram, Rundle v. (49 Miss., 751).....	478	Sams, Daniel v. (17 Fla., 487).....	384
People, Kenyon v. (26 N. Y., 203).....	343	Sanders, Emma C. (11 P. D., 114).....	460, 464
People, Seales v. (13 Ill., 597).....	87	Sargent v. Sargent (36 N. J. Eq., 644).....	46
People v. Baker (76 N. Y., 78).....	176	Schmisseur v. Beatrie (147 Ill., 210).....	19, 45, 445
Perkins, Harvey (13 P. D., 414).....	429, 431, 434	Schreve, Theresia (9 P. D., 78).....	497, 502
Peterson, Daniel G. (13 P. D., 144).....	340	Sconey, James (1 P. D., 272).....	325
Pettit, William F. (8 P. D., 306).....	333	Seaman, Benj. W. (9 P. D., o. s., 8).....	117
Phipps, Eli, minors of (8 P. D., 111).....	24, 36	Seales v. People (13 Ill., 597).....	87
Physick's Estate (2 Brewst., 179).....	212	Sell, Isaac (2 P. D., 177).....	324
Pick v. Pick (13 P. D., 299).....	337	Semple v. United States (24 Ct. Cl., 422) ..	110
Pierce v. Pierce (12 P. D., 412) ..	57, 123, 139, 162, 406	Shaffer, James (5 P. D., 6).....	307
Pierson, Allen B., minor of (13 P. D.,		Shannon, Andrew J. (7 P. D., 64).....	515
151).....	7, 430, 434	Sharkey v. Sharkey (13 P. D., 297).....	45
Pinkey v. Pinkey (4 Green, 324).....	394	Sheldon v. Sheldon (13 P. D., 542).....	152, 473
Pension Agent Clements (5 P. D., 328).....	154	Sherman v. Sherman (13 P. D., 203) ..	123, 139, 317
Plount, Edward (13 P. D., 541).....	429, 434	Shores v. Shores (23 Ind., 546).....	47, 413
Poor v. Poor (8 N. H., 307; 29 Am. Dec., 664-		Siler, Isabel W. (10 P. D., 1).....	19, 45
670).....	54	Silman, James D. (12 P. D., 431).....	118
Pope, Meyers v. (110 Mass., 314).....	461, 464	Simon v. Croft (182 U. S., 427).....	474
Porritt v. Porritt (18 Mich., 420-424).....	134	Simms, Daniel v. (49 W. Va., 554).....	34
Potter v. Ranlett (116 Mich., 454).....	233	Simpson, Darwin C. (8 P. D., 311).....	173
Potter's Dwarrit on Statutes and Constitu-		Smith, Richardson v. (80 Md., 189).....	532
tions, 144.....	526	Smith v. Smith (55 N. J. Eq., 222).....	46
		Smith, Charles (28 Fee P. L. B., 419).....	275

	Page.		Page.
Smith, Robert A. (12 P. D., 141)	118	Tomson v. Ward (1 N. H., 12)	35
Snow v. Northey (19 L. D., 493)	196	Treatise on Practice, Pension Bureau:	
Sousa, Elizabeth (12 P. D., 166)	2, 225	Par. 5, p. 79	2
Southwick v. Southwick (97 Mass., 327; 93		Par. 7, 8, p. 85	152
Am. Dec., 95)	54	Trickey, Hartwell, minors of (8 P. D., 84) ..	333
Southworth, Newton v. (7 N. Y. State, 130) ..	248	Trimble, Sarah, mother of George (7 P. D.,	
Sparhawk v. Sparhawk (114 Mass., 355)	440	o. s., 303)	267, 269
Spencer, John (7 P. D., 152)	2	Trout, John R. (11 P. D., 435)	263
Spencer, Letitia C. A. (13 P. D., 68)	497, 500	Truce, Joab (3 P. D., 14)	208
Spinney, Willard (7 P. D., 335)	118	Tunison, Matilda C. (11 P. D., 440)	284
Staiger's estate (7 D. R., 351)	212	Turner v. King (98 Ky., 253)	342
Stakes, Geo. H. (4 P. D., 158)	308	Turner, Isaac (7 P. D., 523)	70
State, Andre v. (5 Iowa, 389; 68 Am. Dec.,		Tuttle, Josiah T. (3 P. D., 52)	552
708)	342	Tuttle, Samuel (11 P. D., 278)	348
State v. Elspinozer (20 Nev., 209)	342	Tuxbury's appeal (67 Me., 267)	34
State Fox v. (3 Tex., 329)	180		
State v. Marvin (12 Iowa, 499)	87, 246	U.	
State v. Miller (3 Pennewill, 518)	528	United States, Alexander v. (4 Ct. Cl.,	
State v. Parker (96 Mo., 383)	342	218)	34, 110, 111
State v. Swartz v. (13 Ohio C. C. Rep.)	430	United States, Byrnes v. (26 Ct. Cl., 302) ..	516
State v. Swope (11 Ind., 91)	34	United States, Dally v. (17 Ct. Cl., 144)	110
State v. Wetherby (43 Me., 258)	351	United States, Davidson v. (21 Ct. Cl., 298) ..	2
State v. Whalley (10 S. C., 500)	539	United States, Donnelly v. (17 Ct. Cl., 105) ..	110
Steineman, Loring v. (1 Met., 204)	441	United States v. Goldenberg (168 U. S., 95) ..	554
Stevenson, Susan (3 P. D., 171)	118	United States v. Green (98 Fed. Rep., 63) ..	19, 235
Stewart on Marriage and Divorce:		United States, Hendee v. (124 U. S., 3)	516
sec. 125	158	United States v. Koch (21 Fed. Rep., 7)	135
sec. 257	134	United States, Mitchell v. (88 U. S., 3)	407
sec. 259 and n. 13, p. 7	524	United States v. Moore (95 U. S., 760, 763) ..	98
sec. 345	158	United States, Mouat v. (124 U. S., 308)	516
Still, James (12 P. D., 25)	7, 431, 434	United States v. North (112 U. S., 510)	327
Stockbridge, pet. (145 Mass., 517)	441	United States, Semple v. (24 Ct. Cl., 422) ..	110
Strong, in re (86 Hun., N. Y., 390)	176	United States, Teller v. (107 U. S., 64)	110
Strunk v. Button and Strunk (14 P. D., 17) ..	179,		
	233, 240	V.	
Sutherland on Statutory Construction:		Valleau v. Valleau (6 Paige, 207)	20, 179
sec. 218	98	Valentine, Barker v. (125 Mich., 336)	555
sec. 234	113	Van Dusen, Jackson (5 Johnson, 144)	193
sec. 237	88	Van Houten v. Van Houten (12 P. D., 157) ..	370
sec. 240	109	Veach, William H. (12 P. D., 273)	393
sec. 253	88	Viles, Mahala (12 P. D., 465)	438
sec. 272	108		
secs. 283, 289	41	W.	
secs. 307, 309	97	Waddingham v. Waddingham (21 Mo. Ap.,	
sec. 325	108	609)	501
secs. 368, 394, 399	110	Wales v. Wales (119 Mass., 89)	440
sec. 420	34	Wallace, Francis, widow of (13 P. D., 286) ..	110
Sutton, Alexander, minor sisters of (8 P. D.,		Wallace, John C. (33 Fee P. L. B., 13)	229
137)	489	Walton v. Cotton (19 How., 355)	109, 110
Swann, Margaret M. (8 P. D., 149)	410	Ward, Tomson v. (1 N. H., 12)	35
Swartz v. State (13 Ohio C. C. Rep., 62)	430	Wardell, Clayton v. (4 N. Y., 230)	249
Swope, State v. (11 Ind., 91)	34	Wardwell v. Wardwell (14 P. D., 234)	522
		Warner v. Warner (54 Mich., 492)	55, 130, 134
T.		Warner, Rachel (12 P. D., 266)	361
Tallman, Evelyn S. (6 P. D., 261)	327	Washington, Patsey (8 P. D., 362)	537
Taylor v. Taylor (25 N. Y., Misc., 566)	20, 179	Waters, Catherine (9 P. D., 206)	495
Taylor, David (16 P. D., o. s., 246)	273	Watkins, Julia A. E. (10 P. D., 202, 208)	552
Teberg, Peter J. (8 P. D., 224)	229	Watson, John T. (12 P. D., 92)	171
Teere et al. v. Huntington (22 How., 2)	342	Watt, Anderson v. (138 U. S., 706)	406
Teller v. United States (107 U. S., 64)	110	Webster, Chase v. (168 Mass., 228)	440
Thomas, Peggy (13 P. D., 98)	20, 24, 179	Weddle, John R. (2 P. D., 97)	511
Thompson v. Thompson (114 Mass., 566) ..	462, 466	Welsh, William (4 P. D., 279)	507
Thomson, Commonwealth v. (11 Allen, 23) ..	411	Wetherby, State v. (43 Me., 258)	351
Thorn, Graham (14 P. D., 249)	392	Whalley, State v. (10 S. C., 500)	539
Thorndike, Loring v. (5 Allen, 257)	460		
Toller, William, minors of (7 P. D., 545) ..	289		

	Page.		Page.
Wharton on Evidence, vol. 2, secs. 812.....	193	Willie v. Willie (14 P. D., 43).....	240
1245.....	168	Wilson, Cheever v. (6 D. C., 149).....	161
1284.....	79	Wilson, Cheever v. (76 U. S., 123).....	407
Wharton and Stille's Medical Jurisprudence:		Wilson, Joseph P. (11 P. D., 308).....	153
Vol. 1, sec. 249.....	193	Wilson, Mary A. (6 P. D., 222).....	82, 507
§ 892 (p. 731).....	552	Wilson, Minna (11 P. D., 339).....	24
Wheeler v. Wheeler (52 Iowa, 511).....	402	Wilson, William (10 P. D., 232).....	155, 287, 324
White, Lockart v. (18 Tex., 102).....	159	Winkler, Anna M. (11 P. D., 241).....	425
White v. Lowe (1 Redf., 376).....	20, 179, 376	Winkler, Zachariah (9 P. D., 172).....	287, 421
White v. White (105 Mass., 327).....	180	Worcester, Milford v. (7 Mass., 48).....	458, 460, 463
White, Simeon (2 P. D., 210).....	325	Worrell, Benjamin F. (6 P. D., o. s., 309)....	117
Whitehead, Malvin B. (7 P. D., 427).....	329	Wykoff, George E. (9 P. D., 52).....	118
Whitney v. Whitney (11 P. D., 301).....	50, 130, 134		
Wilds, William W. (11 P. D., 95).....	550		
Wiley, Rebecca (10 P. D., 304).....	533		
Wilkinson v. Payne (4 Term R., 468).....	471		
Williams v. Kilburn (88 Mich., 279).....	555		
Williams v. Kimball (35 Fla., 49).....	384		
Williams v. Williams (46 Wis., 464).....	19		
Williams, Joseph C. (7 P. D., 218).....	198		
Williamsport v. Eldred (84 Pa. St., 429, 432) 161, 489			

Y.

Yant, John (1 P. D., 118).....	118
Yates v. Houston (3 Tex., 433).....	159

Z.

Zerntlien v. Bram (100 N. Y., 12).....	386
Zimmerman, Sarah L. (8 P. D., 429).....	333
Zoller, Jones v. (29 Hun., 551).....	20, 179

LAWS CITED AND CONSTRUED.

United States Statutes at Large.

	Page.		Page.
1817, February 11, succession.....	415	1882, August 7—Continued.	
1855, March 3, evidence, act of January 29, 1857.....	359	Marriage—Continued.	
1862, July 14:		Connecticut laws.....	355
Enlistment, service.....	71	Delaware laws.....	527
Minors.....	28	Divorce—	
1864, July 4, limitation.....	29	Act March 3, 1899.....	43
1865, March 3, minors, limitation.....	29	Act March 3, 1901.....	438, 452
1866, June 6, minors deserted by widow.....	29	Decree, jurisdiction.....	173, 279, 452
1866, June 6, rerating.....	216	limitation.....	265
1866, July 25, increase to minors.....	29	nisi.....	438
1867, March 2, Division of Pension.....	1	of nullity.....	265, 290
1868, July 27:		record of.....	535
Minors, five years' limitation.....	29	res judicata.....	146
Stepchildren.....	29	Utah, jurisdiction of probate	
Widow, restoration.....	194	courts.....	99
1872, June 4, rating.....	185	Estoppel.....	438
1873, March 3, minor, limitation.....	27	Evidence.....	17, 21,
1874, June 18, rate, act March 4, 1890.....	211	156, 212, 290, 349, 355, 365, 417, 428,	
1878, March 3, minors, limitation removed.....	30	438, 442, 456, 491, 530, 535, 537, 554	
1878, June 17, total disability of both feet.....	524	Florida laws, slaves.....	393
1879, January 25, arrears.....	30	Illinois laws.....	442
1879, March 3:		Impediment.....	21, 38,
Minors, limitation.....	24, 30, 31, 33, 490	212, 242, 310, 349, 355,	
Section 4702.....	35	365, 417, 428, 493, 554	
1880, June 16, increase.....	211	Kentucky laws, slaves.....	474
1882, August 7, desertion, removal.....	196	Louisiana laws.....	21, 344
1882, August 7, widows and minors:		Legitimacy.....	428, 474
Adulterous cohabitation—		Maine laws.....	349
Admissions.....	84	Maryland laws.....	347, 530
Evidence.....	242	Massachusetts laws.....	438, 456
Reputation, estoppel.....	469	Michigan laws.....	417, 554
Restoration, act March 3, 1901.....	362	Mississippi laws, colored.....	476
Special examiner's conduct.....	219	Missouri laws.....	491, 497
Marriage—		New York laws.....	173, 365
Age.....	554	Ohio laws.....	428
California laws.....	265	Pennsylvania laws.....	212, 417
Cohabitation and repute.....	417, 445, 456, 476	Presumption.....	56, 497, 530
		Presumption of death.....	438, 442
		South Carolina laws, slaves.....	537

1882, August 7—Continued.	Page.	1890, June 27—Continued.	Page.
Marriage—Continued.		Joint resolution July 1, 1902—Con.	
Tennessee laws.....	438	Fee.....	276
Texas laws, colored.....	156	Pardon.....	352
Utah laws, divorce.....	99	Service, last contract.....	552
Virginia laws.....	446	Limitation, commencement, orphan	
Washington laws.....	535	brothers and sisters.....	490
West Virginia laws.....	38	Marriage, see 1882, August 7, mar-	
Widow's title, act of June 27, 1890..	347	riage.	
1883, March 3, increase.....	184	Medical examinations.....	450
1883, March 3:		Minors—	
Payment to wife, child, or parent..	3	Commencement.....	7
Soldiers' Home, Washington, D. C..	3	Declaration.....	7
1884, July 4:		Title, independent of mother..	431
Attorneys, recognition.....	187	Presumption of death, evidence...	442
Fee, agreement, widow and minor..	200	Special act, helpless minor.....	331
1884, July 5:		Reimbursement.....	57
Desertion, removal.....	196	Service—	
Faithful service, joint resolution of		Evidence, drafted man.....	63
July 1, 1902.....	502	Leave.....	257
1885, March 3, contract surgeons.....	516	Muster.....	249
1886, March 19, service, marriage.....	95	Presumption.....	282
1886, May 17, desertion, removal.....	196	Record.....	249, 388
1886, August 4:		Termination of war of rebellion. 71, 326, 346	
Amputation, rate.....	264	Vicious habits.....	57
Increase, rerating.....	183, 215	1891, March 3, Powell's Battalion.....	287, 420
1887, January 29:		1892, July 27:	
Arrears, act of January 5, 1893.....	155	Service—	
Commencement.....	40	Evidence.....	296, 408
Contract surgeons.....	517	Length of service, travel pay....	494
Discharge, evidence.....	197	Limitations.....	13
Gray's Battalion.....	285, 420	1893, January 5:	
Honorable discharge, special act... 195		Increase—	
Service, teamster.....	357	Commencement.....	41, 155
1888, June 7, limitation removed, widows..	30	Gray's Battalion.....	285, 420
1888, August 14, desertion, removal.....	196	1893, December 21, vested right.....	110, 319, 408
1899, March 2:		1895, March 2, accrued pension, joint reso-	
Desertion, removal.....	196	lution, 1902.....	105
Volunteers, act June 27, 1890, con-		1897, February 5, Gray's Battalion.....	285, 420
structive discharge.....	326	1898, May 4, navy pensions, division of pen-	
1890, March 4, Aid and attendance, com-		sion.....	2
mentment.....	209	1899, March 3:	
1890, June 27.		Appeal, practice.....	472
Adulterous cohabitation.....	84	Attorneyship.....	130
Attorneys—		Burden of proof.....	17
Election.....	269	Character.....	177, 340
Fee, renewal, increase.....	256	Desertion.....	10, 45,
Recognition.....	269	130, 146, 159, 191, 230, 394, 404, 481, 489, 521	
Service.....	228	Evidence, reopening.....	334
Contract surgeons.....	515	Insanity.....	191
Declaration—		Laches.....	120, 127
Amendment.....	434	Marriage and divorce.....	17,
Practice.....	426	43, 230, 235, 483, 521	
Dependent parents.....	271, 294	Divorce, decree, res judicata... 146	
Desertion, removal, joint resolu-		Naval Home.....	1
tion July 1, 1902.....	502	Practice.....	8, 127, 235, 313, 472
Discharge—		Reimbursement.....	367, 482
Honorable, pardon.....	352	Special examination.....	338, 483
Record.....	249	Special examiners.....	150
Without honor.....	283, 413	1900, April 23: Increase, Mexican war. 40, 288, 420	
Drafted man.....	63	1900, May 9:	
Fraud and mistake.....	57	Dependence.....	80, 281, 360
Increase, commencement.....	69	Divorce, decree, jurisdiction.....	279
Joint resolution July 1, 1902—		1901, March 3:	
Bounty or gratuity.....	380, 466	Adjudication de novo.....	141, 213, 318
Disloyalty, death prior to re-		Adulterous cohabitation.....	362
moval of bar.....	104, 422	Declaration, decree nisi.....	440

1901, March 3—Continued.	Page.
Divorce	111, 196, 411, 452
Presumption of death, estoppel	441
Dropping, section 4706, R. S.	128, 194
Fraud or mistake, res judicata	141
Act December 21, 1893	320
1902, June 27:	
Limitation	13
Service, evidence	296, 298
1902, July 1: Joint resolution:	
Attorneys, recognition	276
Bounty or gratuity	466
Substitute, private contract	380

1902, July 1: Joint resolution—Continued.	Page.
Desertion, removal	502
Disloyalty, death prior to removal of bar	104, 422
Pardon, honorable discharge	352
Service, last contract	552
1903, March 2:	
Artificial limb	264
Practice	215
Rating, commencement, act March 3, 1883	506
Total disability in both feet	524

Sections of the Revised Statutes of the United States.

	Page.
1651, Length of service, Indian wars	495
2418, Bounty land, lapse of title	416
4693, Service, muster	392
4693, Contract surgeons	518
4694, Increase, commencement, act June 27, 1890	69
4701, Length of service, Indian wars	410, 495
4702, Line of duty, absence from command ..	114
Minors, commencement	31
4703, Special act, continuance	332
4704, Legitimacy, marriage, laws of Ohio ..	428
4705, Legitimacy	288
Marriage	24, 157, 437
4706, Restoration, act March 3, 1901	128, 194
4707, Dependent parents, abandonment	271
Means of support	267
Orphan brothers and sisters	490

	Page.
4709, Limitation, minors	31, 33
4713, Division of pension	2
4715, Navy pensions	2
4716, See 1902, July 1, joint resolution, dis- loyalty	
4718, Accrued pension	36
4719, Adjudication de novo	320
Remarriage, estoppel	469
Restoration	106
Vested right	110
4756, Division of pension	1
4757, Division of pension	1
Payment, jurisdiction	226
Reimbursement, overpayment, reduc- tion	224
5597, Bounty land, lapse of title	416

State Statutes.

	Page.
California, Laws of 1901, p. 335, marriage ..	266
Delaware:	
Constitution, art. VII, 5 and 9, Laws of England, marriage	527
Revised Code, chap. 74, sec. 2, Ibid.	528
Florida, acts of December 12 and 14, 1866, slave marriage	384
Illinois, Rev. Stats., chap. 68, secs. 5, 9, 11, 15, property rights, dower	294
Kentucky, act of February 14, 1866, mar- riage, legitimacy	475
Louisiana, Civil Code, art. 91, marriage	344
Maryland, Laws of 1867, marriage, colored persons	348
Massachusetts:	
Laws of 1870, chap. 404, decree nisi	440
Rev. laws, chap. 151, sec. 39, marriage ..	465
Stats. of 1840, chap. 84, and 1841, chap. 20, Ibid	461

	Page.
Mississippi, Const. December 1, 1869, art. 12, sec. 22, marriage	477
Missouri, act of February 20, 1865, marriage, slaves	491
New York, Rev. Stats., chap. 8, art. 1, sec. 6, v. 3, p. 2332, marriage	20, 177, 366
South Carolina, act of December 21, 1865 (13 Stat. L., 269), marriage of slaves	537
Texas, June 5, 1837 (art. 4670, Paschal's Annot. Dig.), marriage of colored persons ..	157
Utah, act of March 6, 1852, divorce, probate court	99
Virginia, act of February 27, 1866; Code, secs. 2222, 2553, 2554, marriage	447
Wisconsin, Rev. Stats., secs. 2330, 2333, 2394, 4594, marriage, impediment	19

TABLE OF CASES OVERRULED OR MODIFIED.

A.		J.	
	Page.		Page.
Armstrong, Jasper N. (14 P. D., 285), modified	420	Johnson, Gus (8 P. D., 463), modified	474
B.		M.	
Barleyoung, John (7 P. D., 453), modified..	71	Monroe, Elizabeth (3 P. D., o. s., 282), overruled	445
Burton, Jennette (9 P. D., 31), overruled (13 P. D., 90)	428		
C.		P.	
Campbell, Mark G. (8 P. D., 203), overruled in part	106	Parcell, Catherine (13 P. D., 450), overruled in part	63
Comstock, Harriet (10 P. D., 220), overruled.	554	Perkins, minors of Harvey (13 P. D., 414), overruled	428
G.		Plount, minor of Edward (13 P. D., 541), overruled	417
Gabriel, Francoise (12 P. D., 382), overruled.	344	Pulver, John W., alleged minors of (13 P. D. 541), reinstated	428
Geddings, Esther (36 Fee P. L. Bk., 374), overruled	186		
I.		S.	
Instructions (10 P. D., 465), overruled.....	24	Sanders, Emma (11 P. D., 114), overruled ..	456
		Schreve, Theresa (9 P. D., 78), overruled..	497

DECISIONS RELATING TO PENSIONS.

DIVISION OF PENSION—LIMITATION—NAVY PENSION—NAVAL HOME—
ACT MARCH 3, 1899.

WILLIAMS v. WILLIAMS.

There is no authority under the act of March 3, 1899, for dividing the money benefits granted by act of March 2, 1867 (section 4756, Revised Statutes), and allowing or paying one-half thereof to the wife of a sailor, on the ground that he is an inmate of the Naval Home, at Philadelphia.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
June 27, 1903.*

Catherine Williams appealed May 11, 1903, from the Bureau action of February 12, 1903, allowing her claim for one-half the pension of her husband, George Williams, a naval pensioner under certificate No. 27108, on the ground that he was an inmate of the United States Naval Home, Philadelphia, Pa., and awarding her one-half his pension of \$8 per month under the general law only.

Claimant, by her attorney, Augustus B. Tolman, contends in her said appeal that she should have been awarded one-half of his pension allowed under the act of March 2, 1867 (section 4756, Revised Statutes), as well as one-half of his pension allowed him under the general law; that the act of March 3, 1899, does not exempt any pension from its provisions, and that if there are any other provisions of law relating to the disposition of the naval pension, inconsistent with the provisions of the act of March 3, 1899, they are repealed by the latter act.

Pensioner has filed no answer to said appeal, but in a communication to the Pension Bureau he expresses his willingness that his wife should have one-half of his naval pension of \$10.50 per month, as well as one-half of his pension under the general law.

Pensioner is an inmate of the Naval Home at Philadelphia, Pa., and is in receipt of a naval pension or money benefit of \$10.50 per month, awarded him by the Secretary of the Navy under section 4756, Revised Statutes, and is also in receipt of a pension of \$8 per month, allowed by the Secretary of the Interior under the general law.

Claimant's contention can only be conceded to be correct as applied to the pension granted her husband by the Commissioner of Pensions, acting under the supervisory control of the Secretary of the Interior. Over this pension the Bureau and this Department have exclusive control, and can, under the law, allow, increase, diminish, suspend, divide,

or terminate the same, as the evidence in the case may warrant, but the pension or money benefit awarded pensioner by the Secretary of the Navy, pursuant to the provisions of the act of March 2, 1867, now section 4756, Revised Statutes, is a fund over which the Pension Bureau and this Department have no jurisdiction, the only duty in relation thereto, so far as this Department is concerned, being merely ministerial. It acts as the disbursing agent of the Secretary of the Navy.

As was stated by Assistant Secretary Frank L. Campbell, in the case of Elizabeth Sousa (12 P. D., 166-173)—

It is manifest from the express language used in said sections 4756 and 4757, Revised Statutes, that the Commissioner of Pensions is without any judicial authority to hear or determine any question relative to the allowance of said money benefits, or to decide the amount thereof, or who may be entitled to receive the same, but stands in relation thereto in a purely and strictly ministerial capacity.

As also held by this Department in said Sousa case, while the money benefits awarded sailors by the Secretary of the Navy under said sections 4756 and 4757 were designated therein as pensions, and are payable out of the naval pension fund, under the direction of the Commissioner of Pensions, yet they are not pensions in the usual and ordinary acceptance of that term, within the meaning of section 4715 or the act of June 27, 1890, which forbids the allowance or payment of more than one pension to the same person at the same time, but are allowances for the support of the beneficiaries named in said sections 4756 and 4757, in addition to pensions granted under other pension laws. See also departmental decisions in the cases of John Spencer (7 P. D., 152); Richard Ewing (8 P. D., 44); William Finley (11 P. D., 410); Treatise on Practice Pension Bureau, paragraphs 7 and 8, paragraph 85, and Christopher P. Davidson v. United States (21 Ct. Claims, 298).

Section 4813, Revised Statutes, page 934, as amended by the act of May 4, 1898, 30 Stat. L., 377, provides as follows:

Whenever any navy officer, seaman, or marine, entitled to a pension, is admitted to the navy hospital the pension, during his continuance in the hospital, shall be paid to the Secretary of the Navy and deducted from the account of said pensioner. And whenever any officer, seaman, or marine, entitled to a pension, is admitted to the naval home at Philadelphia, or a naval hospital, his pension, while he remains there, shall be deducted from his accounts and paid to the Secretary of the Navy for the benefit of the fund from which such home or hospital, respectively, is maintained.

When, therefore, the act of March 3, 1899, provided that whenever a resident pensioner of the United States became an inmate of a national home one-half the pension drawn in his behalf, or to which he may become entitled during his residence therein, should be paid his wife on the order of the Commissioner of Pensions, the pension referred to is not the pension or money benefit allowed by the Secretary of the Navy under section 4756, over which the Commissioner of Pensions has no control aside from the payment thereof, but is limited to the pension in its general sense, over which the Commissioner has jurisdiction.

There are many reasons for this conclusion which it is not necessary to enumerate at this time, but one will suffice, namely: If the money allowance by the Secretary of the Navy, under section 4756, is a pension within the meaning of the act of March 3, 1899, then it is also a pension within the meaning and intent of section 4715, Revised Statutes, and pensioner would not be entitled to his general law pension in addition to his money allowance under section 4756, Revised Statutes.

It is to be noted in this connection that the "naval home at Philadelphia" is not mentioned in the act of March 3, 1899; that said naval home is not a "State home for soldiers and sailors," nor a "national soldiers' home;" that claimant is not seeking to obtain one-half her husband's pension on the ground that he had deserted her, but solely upon the ground that he is an inmate of the "United States Naval Home, Philadelphia, Pa."

In the act of March 3, 1883, Congress provided, in section 4 of said act—

That an inmate of the home who is receiving a pension from the Government and who has a child, wife, or parent living, shall be entitled, by filing with the pension agent from whom he receives money a written direction to that effect, to have his pension, or any part of it, paid to such child, wife, or parent.

This provision of said act was, by its terms, limited to the "Soldiers' Home located at Washington, in the District of Columbia."

The foregoing provision and the provisions of section 4766 providing for the payment to the wife of the pension of an "insane invalid pensioner" and "pensioners imprisoned as punishment for offenses against the laws" and the cases provided for in the amendment of said section (act of March 3, 1899) are the only laws authorizing payment of an invalid pension, or any fraction thereof, to the wife of the pensioner.

Had Congress intended to confer authority upon the Commissioner of Pensions to divide the money allowance to sailors under said sections 4756 or 4757, and transfer payment of one-half thereof to the wife of the sailor, thereby divesting the Secretary of the Navy of any control over one-half of said allowance, such intent would naturally have been indicated by plain and unmistakable language. No such intent is indicated by any language or expression to be found in said act of March 3, 1899.

The Department is therefore of the opinion that there is no authority under the act of March 3, 1899, for dividing the money benefit granted by the act of March 2, 1867 (section 4756, Revised Statutes), and allowing or paying one-half thereof to the wife of a sailor pensioner while he was an inmate of the naval home at Philadelphia, Pa., and that the refusal of the Bureau to allow her one-half of the \$10.50 allowance was not error.

The Bureau action appealed from is accordingly affirmed.

DEPENDENCE—MEANS OF SUPPORT—SECTION 4707, REVISED STATUTES.

DOTTIE MAY DEMAREE (SISTER).

When it has been determined that a mother or father of a deceased soldier was dependent on him for support as provided by section 4707 of the Revised Statutes, and the proof shows that the minor brothers and sisters had no independent means of support, their dependency follows as a necessary consequence; and upon the death of the parents, or the death of the father and remarriage of the mother, they become entitled to pension on proof of relationship and such other proof as may be necessary to negative the last proviso of said section.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
June 27, 1903.*

This is an appeal filed February 5, 1902, on behalf of Dottie May Demaree, the sister of Harry N. Demaree, who died during the war with Spain while serving in Company A, First Kentucky Volunteer Infantry. The claim, No. 720541, was filed on June 4, 1900, and was rejected January 22, 1902, as follows:

Rejection on the ground of no title to pension, claimant not having been dependent upon soldier at time of his death.

It appears that the soldier died on August 21, 1898, and that on the 6th of the following September the mother, Aley C. Demaree, applied for a dependent mother's pension. This was granted to run from the date of her application to that of her remarriage on December 24 of 1898, the father of the soldier having died prior to the latter's enlistment.

The proof unquestionably shows that prior to her marriage the mother was in necessitous circumstances, so much so that the minor, Dottie May, became a charge on public charity. Nor does the evidence indicate that the mother's condition was appreciably improved by her marriage. It appears that this applicant was, at the date of this application, and has been since, dependent on charity or upon her own exertions, for support. The appeal is based upon the following contention:

This claim was filed under the provisions of section 4707, Revised Statutes, United States, and the evidence in the claim incontestibly shows that the soldier died in the service of a disease contracted in the line of his duty; that he left neither a widow nor a legitimate child; that he left a mother dependent upon him, who, during the minority of the minor, remarried and who has been pensioned as his dependent mother to the date of such remarriage, that at the date of his death the said minor sister had no property of any kind in her own right and no income from any source and was entirely dependent upon the charity of persons in no wise legally bound to contribute in any manner or to any extent to her support. The only point which is to any degree obscure is whether the soldier by actual contributions, or in any other way, recognized his obligations to aid in the support of his minor sister. This is, however, a legitimate presumption from the fact of the dependence of the mother at the date of the soldier's death, which, in the absence of any property belonging to the sister and any separate income of her own, is the dependence of the

minor sister, even though, as in this case, the mother, through inability properly to care for the minor, was compelled to accept the charity of her parents and relinquish the custody of the soldier's sister.

The soldier's first obligation was to his mother, and it is unreasonable to require proof of contributions to the minor sister during the lifetime of the mother and prior to her remarriage. Before this minor's right accrued the soldier was dead, and it was then too late for the soldier to manifest in any way his obligations to support his sister. The second proviso of said section expressly declares, upon the death or remarriage of a dependent mother, the dependent minor brothers and sisters shall become entitled to the pension, commencing from the death or remarriage of the party who had the prior right to the pension. To hold that during the life of the mother, or prior to her remarriage, the soldier must recognize the obligation to support the minor brothers and sisters is either to render nugatory said second proviso by destroying the right of succession declared therein, or to require spiritual manifestations of a deceased person.

The dependence of the mother was established by evidence and by operation of law, the soldier being a minor, and has been definitely recognized by granting her a dependent mother's pension. There is no proof, however, of any independent dependence of this minor child, or of any recognition on the part of the soldier of any obligation upon his part to contribute to her independent support, for, as a matter of fact, at the time of his death she was a child 13 years old, dependent on her mother, or upon charity, for adequate support. The query naturally arises whether under the terms of section 4707 of the Revised Statutes the child, a sister of the soldier, succeeds as a matter of right to her mother's pension, where it is shown that she has no adequate means of support, or whether it must be shown that she had an independent right, not derived through her mother, which was in abeyance during the existence of a superior right of the mother. In the latter case, this claimant would not be entitled, as there is no proof to show that soldier did contribute to her support, or that he had recognized any obligation on his part to so do.

Section 4707 of the Revised Statutes provides:

That if in any case said person shall have left father and mother who are dependent upon him, then, on the death of the mother, the father shall become entitled to the pension, commencing from and after the death of the mother; and upon the death of the mother and father, or upon the death of the father and the remarriage of the mother the dependent brothers and sisters under sixteen years of age shall jointly become entitled to such pension until they attain the age of sixteen years, respectively, commencing from the death or remarriage of the party who had the prior right to the pension: *Provided*, That a mother shall be assumed to have been dependent upon her son within the meaning of this section if at the date of his death she had no other adequate means of support than the ordinary proceeds of her own manual labor and the contributions of said son or of any other persons not legally bound to aid in her support; and if by actual contributions or in any other way the son had recognized his obligations to aid in support of his mother or was by law bound to such support, and that a father or a minor brother or sister shall, in like manner and under like conditions, be assumed to have been dependent, except that the income which was derived or derivable from his actual or possible manual

labor shall be taken into account in estimating a father's means of independent support: *Provided further*, That the pension allowed to any person on account of his or her dependence, as hereinbefore provided, shall not be paid for any period during which it shall not be necessary as a means of adequate subsistence.

There is nothing in these provisions of this act which indicates the necessity of more than once establishing the question of the obligation for support. The very wording of the act itself excludes the possibility of either the father, mother, or minor children having adequate means of support to the exclusion of the others, and no such case could arise unless, possibly, in the case of a minor who might have some property interests of its own, and in the event that the parents were divorced. The husband is "legally bound to aid" in the support of his wife; the wife, where she has independent means, is likewise "legally bound to aid" in the support of the husband; and both in turn are obligated to support their minor children. Under ordinary circumstances, therefore, such as are found in this case, the dependence of one is proof of the dependence of all, and a recognition of the dependence of one by the soldier, whether the recognition be an actual fact or whether it be a conclusion of law, is the recognition of the dependence of all. There is nothing in the wording of the act which indicates that it was intended that, as each of those who were entitled succeeded to the right, they should be required to make the same preliminary proof as was required in the original claim. The act prescribes the manner in which the rights of the claimant shall be established, and in that part relating to the succession provides, "in any case said person shall have left father and mother who are dependent on him" when by death or operation of law they are no longer able or entitled to take "the dependent brothers and sisters under sixteen years of age shall jointly become entitled." Thus, it having once been determined that the mother or father, as the case may be, was dependent on the son for support, within the meaning of this act, and the proof further showing that the minors had no independent source of income, their dependence followed as a matter of necessary consequence; and when they became entitled by the death of their parents, or by the death of the father and the remarriage of the mother, they succeeded to the mother's or father's right, as the case may be, upon application and proof of relationship, and such other proof as may be required to negative the last proviso of section 4707.

In the case under consideration, the evidence clearly establishes that since the death of the soldier the claimant has been dependent on the charity of those not legally bound for her support, or during the latter part of that period has by her own labor earned a support. It does not appear that the mother, since her remarriage, has contributed to the child's support; nor does the evidence indicate that she was financially able to do so. The Bureau, therefore, erred in requiring of

claimant any proof other than that she was without adequate means of support, independent of charitable contributions and her own exertions; that she stood in a pensionable relationship to the soldier, and that her father was dead and her mother was remarried.

The action complained of is, therefore, reversed, and the papers are returned for action in conformity with this opinion.

DECLARATION—ACT JUNE 27, 1890—MINORS—COMMENCEMENT.

MARTHA APGAR (WIDOW).

The title of minors to pension under the act of June 27, 1890, is distinct and separate from that of the widow, although secondary to the same. It is therefore held that a widow's declaration, when she has failed to prove title, will not be considered as the declaration of the minors, and the minor's claim will not be adjudicated until an application in his or her own right has been filed.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, June 27, 1903.

June 2, 1896, Martha Apgar, the widow of Charles Apgar, formerly of Company E, Thirty-fourth Indiana Volunteer Infantry, applied for pension for herself and the soldier's minor child, under the act of June 27, 1890: Claim No. 634902. Her claim was rejected October 31 of the same year, as the application disclosed that the claimant was not married to the soldier until after the passage of that act.

December 18, 1901, the attorney in the original claim sent the following communication to the Bureau:

About June 1, 1896, application for widow's pension was filed. The application contained an averment that Grace Apgar, a child by soldier's former marriage, was surviving and under 16 years, having been born November 25, 1882. The widow had no title because married subsequent to June 27, 1890.

I now ask that the application be considered in behalf of the then minor child Grace, and that her claim be considered under * * *.

This request was denied by the Bureau on January 13, 1902, and on February 20 following an appeal was taken from this refusal. It is contended in the appeal that the declaration was made on behalf of the widow and child, and that, as the widow had no title, it should be considered as a valid declaration of the minor.

It has been held by the Department that where there is no widow, or where the widow has no pensionable status, minor children are pensionable under the act of June 27, 1890. This is in no way dependent on any right or title of the widow, but is dependent on her lack of title, and, in its absence, the minor's title is a separate and independent right to which the widow is an entire stranger. See cases of the minors of James Still (12 P. D., 25) minors of Allen B. Pierson, and James R. Graves (13 P. D., 148, 151).

The extra compensation accruing to the widow for the care and maintenance of minor children is in no sense a right derived from the same grant as the minor's title, but is merely a superior right, based upon a different principle, and is granted in a separate clause of the act of June 27, 1890. An application made by the widow, although in one sense an application made in behalf of the minor, is in fact an application for her sole benefit and is dependent entirely upon her title, a title distinct and separate from that of the minor's.

The averments in a widow's and minor's declaration would necessarily be different, as the claims are based on an entirely different state of facts. Much of the proof required in either claim would be immaterial in the other. In fact, they are in all respects separate and distinct rights, and should be prosecuted as such.

In the case of John C. Mohrstadt (8 P. D., 413) it was held:

While claimants are not held to strict rules of pleading, yet a good declaration in a pension claim should, the same as a common-law declaration, include all allegations necessary under the law under which the right is claimed that constitute the basis of right under which the claim rests; consequently a specific pleading (declaration) for pension under the act of June 27, 1890, which sets forth only those allegations necessary under that law, is not applicable to, neither is it entitled to, consideration as a declaration under the general law.

The same reasoning upon which the above conclusion was reached precludes the consideration of the widow's declaration as the declaration of the minor child.

The action of the Bureau refusing to consider the widow's declaration as a declaration of the minor is affirmed.

PRACTICE—SPECIAL EXAMINATION—DIVISION OF PENSION.

HYATT v. HYATT.

Where, after a special examination, directed by this Department, after appeal, a claim for division of pension under the act of March 3, 1899, has been decided by the Department, the decision will be deemed final to the extent that, in the absence of fraud or mistake, it will not be reopened or modified without the express direction of the Secretary of the Interior.

The Bureau action, in declining to recommend a reopening of this case, and holding that there was no reason to believe that the special examination was partial or prejudicial to the interest of claimant, and that further action by the Bureau was not deemed necessary or desirable, is affirmed.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions.
June 30, 1903.*

This is an appeal from the Bureau action of October 6, 1902, refusing to recommend a reopening of the claim of Martha A. Hyatt v. Frederick W. Hyatt, certificate No. 282188, and holding that there was no reason to believe that the special examination had in the claim

was partial or prejudicial to the interest of claimant; that the elements of legal desertion were absent, and that further action by the Bureau was not deemed necessary or desirable.

From this action claimant appealed May 21, 1903, contending that:

The Pension Office erred in refusing to consider additional testimony filed by appellant, showing the crossly partial and prejudicial and insulting action of the special examiner who took testimony in the claim, and his refusing to examine certain witnesses in appellant's behalf and at her request. (See additional evidence filed.)

Because this rejection is contrary to the law and facts in this claim; because the rejection is based on the prejudicial report of the special examiner who took the testimony; because the special examiner did not give appellant a fair and impartial hearing, but was partial to appellee and his witnesses, and rude and ungentelemanly to appellant and her witnesses, and threatened her by assault and otherwise, greatly to her prejudice, and frightened her by physical assault and threatening words and manner, whereby she was wronged and aggrieved, and of which she complains. (See testimony filed.) Because she was prejudiced by said examiner refusing to take testimony in her behalf, from witnesses produced and offered, and of other persons whose names and address were tendered to him, whereby she was wronged; because the rejection was and is a serious error and contrary to law and the facts, which she has shown and can show, if permitted so to do.

This case was before the Department on appeal and considered in part, November 19, 1901, when, in view of the irreconcilable conflict and unsatisfactory character of the testimony; the fact that two of claimant's witnesses had repudiated the material portion of their testimony, and that some of claimant's witnesses had executed their affidavits before her attorney, he drafting the affidavits, and also acting in the capacity of notary public in administering the oath to affiants, the papers were returned to the Bureau for special examination.

The Department, after discussing the testimony and the issue presented, directed that notice of the special examination should be given both claimant and pensioner, and an opportunity be afforded them to be present in person or by attorney, to introduce additional testimony if desired, and to cross-examine each other and their witnesses.

The Department also directed that duplicate copies of said departmental order of November 19, 1901, be forwarded to claimant and pensioner, or their attorneys, and that the case be made special, and promptly readjudicated and reported.

The case was accordingly specially examined at Clarence, Shelby County, Mo., where claimant resided, the examination commencing December 21, 1901, and continuing until December 30, 1901. Both parties were present and claimant was also represented by her attorney. Both parties expressed themselves satisfied with the manner in which the examination was conducted. Claimant, in answer to the following interrogatories, replied as follows:

Q. (By examiner.) Have you any complaint to make against me as to the conduct, manner, or fairness of the examination of your claim? If so, please state specifically what it is.—A. I have no complaint to make against anyone.

Q. Do you desire to introduce any more testimony before me?—A. No, sir.

Q. Please give the names of all witnesses that you desire examined elsewhere.—A. I do not believe that I have any other witnesses except those that have filed affidavits.

The report of the special examiner appears to be fair, impartial, and unbiased. That he was compelled to restrain claimant in her interference with witnesses during the examination, and to rule out the testimony of some witnesses as immaterial and irrelevant is very probable, but no exception was taken at the examination by claimant and her witnesses, and it does not appear that the special examiner, who appears to be an experienced lawyer, exceeded his authority in this regard.

He reported that claimant's reputation for truth and veracity is good, and closed his report by recommending, subject to the approval of the chief of the law division, the special examination of several other witnesses.

The papers in the case, including the testimony taken on special examination, were returned to this Department, and the evidence was all carefully considered by Assistant Secretary F. L. Campbell, March 18, 1902, who held that it failed to show that pensioner deserted claimant within the meaning of the act of March 3, 1899. A copy of this decision was forwarded to claimant by the Bureau, March 24, 1902.

No objection was made by claimant or her attorney to the special examination up to this time, nor until June 23, 1902, when she filed her allegation charging the special examiner with an assault upon her and conduct prejudicial to her claim, and alleging that her attorney interfered to prevent the examiner striking her. Her allegation was unsupported by an affidavit or allegation by her attorney, but she accompanied her allegation by an affidavit of a witness who makes no reference to the special examination or the examiner.

On August 29, 1902, claimant filed her affidavit in which she alleged: That said examiner seemed to be, and she verily believed he was, wholly prejudiced against her interest and herself; that he apparently, and she verily believed did, intentionally intend to intimidate her and her witnesses; that he personally charged her with being jealous of the soldier, scolding him and driving him away from home, saying that the trouble between claimant and soldier was all brought about by claimant, and that soldier was wholly innocent; that during the taking of the testimony of one witness for claimant she suggested a question to be asked, whereupon the special examiner, without any cause or provocation, committed an assault upon her by jumping up from his writing table, advancing toward her with both hands raised, and his fists closed, and threatening to do her bodily harm, saying to her: "You shut right up; if you say another word I'll throw you right out of here;" that these words were used in a loud and angry voice and in a threatening manner, which frightened her very much;

that when persons were testifying in her behalf the examiner attempted to intimidate them by telling them that they had better be very careful how they testified to a man's character or reputation, saying that they ought to know what a man's reputation is, lest they might be prosecuted. She further testified that the special examiner asked her if she had any objection to the examination, and said: "If you object to the examination, that will fix everything, for you won't get any pension;" that she wanted to object, but that the examiner actually made her believe she would lose her case if she did so, and by his expressions intimidated her.

She subsequently filed the affidavits of several witnesses who testified in her behalf before the special examiner, and who expressed the opinion that the examiner was biased and prejudiced against claimant. She also filed several affidavits as to her husband's immoral and intemperate habits long prior to their separation in 1891, and that her reputation as "a mild, pleasant, and good-natured lady," was excellent; that she was not possessed of an "ungovernable temper," was not a "common scold," and not insanely jealous of her husband, but was a kind and affectionate wife.

These affidavits, aside from those which charge the special examiner with bias and prejudice against claimant, are cumulative, merely, and mainly a reiteration of former testimony.

After carefully considering the testimony filed by claimant to reopen her said claim for one-half her husband's pension under the act of March 3, 1899, the Department is of the opinion that the Bureau action appealed from was justified.

In cases under the act of March 3, 1899, there is manifest reason why they should not be delayed in prosecution or adjudication. Care is observed in protecting the rights of both claimant and pensioner, and that neither be permitted by dilatory or other vexatious methods to defeat the legal right of the other. Both are allowed ample opportunity, under the rules, to establish their rights under the law. Both are allowed their "day in court." These claims being in the nature of a suit at law, and being between opposing parties, the rules as to notice are carefully observed. When, therefore, the case has been decided by the Department on appeal from the Bureau action, the decision should be final as to the rights of the party. So long as an application under said act, or an appeal is pending, it operates to suspend one-half of a pension which has been allowed and granted to the pensioner. If the unsuccessful party is allowed, by filing supplemental testimony, notices to reopen the claim, appeals from the Bureau action thereon, and notices for reconsideration of departmental decision, it would result in withholding payment of one-half of a granted pension indefinitely and probably during the life of the claimant or pensioner.

Under present practice a claimant is required to support her application with evidence sufficient to establish a *prima facie* case. Pensioner is notified of the claim made and required to file his answer and defense within thirty days. Claimant is required to file her rebuttal evidence within thirty days, whereupon the case is adjudicated by the Bureau and both parties are, under Rule 16 of Practice, notified of the action taken and are allowed thirty days from the receipt of said notice in which to appeal.

Rule 17 of Practice requires that the appeal, when filed, must specifically indicate the error of law or fact complained of, and the grounds relied upon for reversing the Bureau action, and must be accompanied by due proof of service of a copy of the appeal upon the appellee or his or her attorney.

Under Rule 18 of Practice the appellee is allowed thirty days from the date of filing the appeal, in which to file an answer, brief, or argument, in opposition to the appeal, or in support of the Bureau action. Upon the expiration of said thirty days, or sooner if answer be sooner filed, the appeal is ready for consideration and is as promptly considered as the condition of the appeal docket in this class of appeals will permit. Upon the decision being rendered by the Department, on appeal, it is returned with two copies thereof, with the other papers in the case, to the Bureau, which transmits to the parties copies of the departmental decision.

Paragraph 14 of Bureau order No. 69, of May 20, 1903, amending the original order of May 21, 1902, provides that:

As promptness in the adjudication of claims filed under the act of March 3, 1899, is imperative, to avoid vexatious charges against the one or the other, both the claimant and the pensioner will be required to answer calls made for evidence promptly.

Paragraph 16 in said order 69 provides that:

Upon the filing of an appeal, in accordance with the rules of the Department, payment will be still suspended, pending the decision of the Department upon the appeal, as required by Rule 16 of Practice.

Paragraph 10 of said order 69 provides that:

The filing of an application or declaration by a claimant, under the act of March 3, 1899, like an appeal by claimant or pensioner, shall serve the same purpose as a writ of supersedeas, or other similar writ, and shall stay further Bureau proceedings, so far as they involve further payment of one-half the pension in controversy, pending the adjudication of the claim by the Commissioner of Pensions.

These paragraphs from said Bureau order No. 69, and the Rules of Practice of this Department applicable to cases under the act of March 3, 1899, indicate the care observed by the Bureau and this Department regarding the rights of parties in an orderly, expeditious, adjudication and determination of claims under said act.

In contested cases under said act, where an issue of fact is joined between the claimant and pensioner, the determination by the Bureau of said issue should be final, and conclusively settle the questions dis-

cussed, and prevent the parties from subsequent prosecution of a claim founded on the same facts. To such cases the doctrine of *res judicatæ* and estoppel should apply.

In the present case no error or mistake in the former departmental decision of March 18, 1902, is pointed out or in any manner indicated.

When, therefore, after a special examination, directed by this Department, after appeal, a claim for division of pension under the act of March 3, 1899, has been decided by the Department, the decision will be deemed final to the extent that, in the absence of fraud or mistake, it will not be reopened or modified without the express direction of the Secretary of the Interior.

The Bureau action in this case, declining to recommend a reopening of the claim, and holding that there was no reason to believe that the special examination was partial or prejudicial to the interest of claimant, and that further action by the Bureau was not deemed necessary or desirable, appears to have been fully justified, and said action is accordingly affirmed.

SERVICE—ACTS JUNE 27, 1902, AND JULY 27, 1892—INDIAN WARS—LIMITATIONS.

LEWIS LAWLEY.

The act of June 27, 1902, extending the provisions, limitations, and benefits of the act of July 27, 1892, does not limit its benefits to those who served and were discharged under the immediate military authority of the United States only; but to those who served and were discharged under State, Territorial, or provisional authority as well.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, June 30, 1903.

Lewis Lawley, of Capt. S. C. Achilles' Company D, Second Washington Territory Mounted Volunteer Infantry, filed a claim, No. 6382, August 25, 1902, for pension under the act of June 27, 1902. The claim was rejected March 5, 1903, on the ground that the claimant, not having been mustered into the service of the United States, nor paid for his service by the United States, has no pensionable status under said act.

In an appeal filed May 4, 1903, by Hon. Malcolm A. Moody, House of Representatives, it is contended that:

The act of July 27, 1892, did not require proof that the survivors of the Indian wars from 1832 to 1842 were mustered into the service of the United States, or were paid by the United States. The act of June 27, 1902, merely extends the provisions of the act of July 27, 1892, so as to include the survivors of all Indian wars from 1817 to 1858, hence claims under this act should be adjudicated on the same proof and in the same manner as those under the original act. Under the Commissioner's ruling but few of this class of claims can be allowed, for the reason that none of these men, except the regulars, were mustered into the service of the United States, and but few of them have been paid by the United States. These men were never in the service of

the United States, but were enlisted as volunteers, militia, or home guards, under authority given by the several Territories, and the last act states explicitly that the provisions of the *prior act* are extended to include militia and volunteers who served for thirty days or more, and were honorably discharged under the United States military, State, *Territorial*, or provisional authorities, etc.

Now, this is the law, but the Honorable Commissioner of Pensions holds that these claims can not be allowed on the proof of service alone, but that it must be shown that the claimant was *mustered into the service of the United States*, or was paid by the United States.

I claim that the third clause of the act is of no force, for it provides "that where there is no record of enlistment or muster into the service of the *United States* in any wars mentioned in this act, the record of pay by the United States shall be accepted as full and satisfactory proof of such enlistment and service."

According to this clause one would infer that volunteers were mustered into the service of the United States—which is not a fact—and, in order to establish a claim for pension, must *prove* that they were mustered in—something impossible for them to do; hence the clause is of no force or effect, for it conflicts with both the original and supplemental acts, and if enforced will deprive the claimants of the benefits and rights that the framers of the law undertook to give them.

Upon consideration by the Department the papers in the case were returned to the Bureau for a further report from the Auditor for the War Department relative to the service rendered by this claimant, and the following report is now before the Department for consideration:

The Honorable the COMMISSIONER OF PENSIONS.

SIR: Replying to your letter of the 15th instant, in pension claim No. 6382 of Lewis Lawley, Company D, Second Washington Territory Volunteers, Indian wars, requesting a further search be made and an additional report furnished, showing all that may be found touching the pay and service of the soldier, I have the honor to inform you that the records of this office show that there was found by the commissioners pay as follows:

Pay for service from March 17 to September 1, 1856, 168 days, at \$2 per day.	\$336. 00
Pay for use and risk of horse, 168 days, \$2 per day	336. 00
	672. 00
Stoppage	30. 00
Balance due	642. 00

That the Third Auditor found there was due the soldier as follows:

Pay	\$87 18
Use and risk of horse	67. 00
	154. 38
Stoppage	20. 00
Balance due	134. 38

which amounts last above given appear to have been revised by that office subsequently, as follows:

Pay	\$120. 18
Use and risk of horse	67. 20
	187. 38
Stoppage	20. 00
Amount due	167. 38

The muster and pay roll of Captain Achilles' Company D, Second Washington Territory Volunteers, furnishes the following information relative to the above-named soldier:

Age 22; enrolled March 17, 1855, at Vancouver, by Captain Achilles; horse valued at \$138; equipments \$3; discharged September 1, 1856; period of service one hundred and sixty-eight days; equipments, arms, etc., received from Territory during service, \$30.

This roll is headed "Muster and pay roll of Lieut. Commanding Jephtha S. Powell, Company D, Second Regiment Washington Territory Mounted Volunteers, called into the service of the Territory by proclamation of Governor I. I. Stevens, dated 23d January, 1856, from the 11th day of February, 1856, to the 1st day of September, 1856."

The following certificates also appear at the foot of this roll:

"I certify on honor that I have carefully examined this muster roll, and that I have mustered out of the service of the Territory of Washington the above-named company of volunteers. Dated Vancouver, Washington T., this 1st day of September, 1856.

"M. B. MILLARD, *Mustering Officer.*"

The muster roll accompanying the muster and pay roll furnish the following information relative to said soldier:

"Age; born, Alabama; height, 5 feet 9; complexion, fair; hair, black; eyes, hazel; residence, Washington, T.; enrolled as above for six months; furnished his own horse and equipments."

The following certificates appear on this roll:

"I certify on honor that this muster roll is made out in the manner required by the printed notes; that it exhibits the true state of First Lieutenant Commanding Jephtha S. Powell's company (D), of the regiment Washington Territory Volunteers, for the period herein mentioned; that the remarks set opposite each officer and soldier are accurate and just; and that the 'Recapitulation' exhibits in every particular the true state of the company as required by the regulations, rules, and Articles of War.

"Lieut. J. S. POWELL,

"*Commanding the Company.*"

"I certify on honor that I have carefully examined this muster roll and that I have mustered out of the service of the Territory of Washington the above-named company of volunteers.

"M. D. MILLARD,

"*Inspecting and Mustering Officer.*"

Upon the question relative to soldier having been properly enlisted and mustered into the military service, and discharged therefrom, under authority of either the United States or the Territory of Washington, you are informed that the records of this office show exactly the same conditions of enrollment and muster (as given above) as exists in the cases of all of the other soldiers from Washington or Oregon Territories serving in the Oregon Indian war of 1855-56.

Since the report from this office of February 13, 1903, was made a claim has been filed by the above-named soldier (post-office address), The Dalles, Wasco County, Oreg.), for arrears of pay, etc., which, having been examined, was, on June 1, 1903, allowed by Treasury certificate No. 369761 (C. I., No. 187290), for items as follows:

Pay from May 17, 1856, to September 1, 1856, 5 months and 15 days.....	\$66. 00
Use and risk of horse, same period	67. 60
Clothing pay, same time.....	21. 23
	154. 83
Stop for clothing drawn (two-thirds of \$30).....	20. 00
Balance allowed.....	134. 83

There is no appropriation for the payment of this claim. It will be reported to Congress as early as practicable, and paid when funds for the purpose become available.

While it appears that the pay, etc., was computed by the Commissioners at the rate of \$2 per day, as matter of fact pay was allowed by the Third Auditor and this Bureau at the rates received by soldiers of the Regular Army as of the grade and date of service.

The act of June 27, 1902, extending the provisions, limitations, and benefits of the act of July 27, 1892, reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions, limitations, and benefits of the act entitled "An act granting pensions to survivors of the Indian wars of eighteen hundred and thirty-two to eighteen hundred and forty-two, inclusive, known as the Black Hawk war, Creek war, Cherokee disturbances, and the Seminole war," approved July twenty-seventh, eighteen hundred and ninety-two, be, and the same are hereby, extended, from the date of the passage of the act, to the surviving officers and enlisted men, including marines, militia, and volunteers of the military and naval service of the United States who served for thirty days or more and were honorably discharged under the United States military, State, Territorial, or provisional authorities in the Florida and Georgia Seminole Indian war of eighteen hundred and seventeen and eighteen hundred and eighteen; the Fevre River Indian war of Illinois of eighteen hundred and twenty-seven; the Sac and Fox Indian war of eighteen hundred and thirty-one; the Sabine Indian disturbances of eighteen hundred and thirty-six and eighteen hundred and thirty-seven; the Cayuse Indian war of eighteen hundred and forty-seven and eighteen hundred and forty-eight, on the Pacific coast; the Florida wars with the Seminole Indians, from eighteen hundred and forty-two to eighteen hundred and fifty-eight, inclusive; the Texas and New Mexico Indian war of eighteen hundred and forty-nine to eighteen hundred and fifty-six; the California Indian disturbances of eighteen hundred and fifty-one and eighteen hundred and fifty-two; the Utah Indian disturbances of eighteen hundred and fifty to eighteen hundred and fifty-three, inclusive, and the Oregon and Washington Territory Indian wars from eighteen hundred and fifty-one to eighteen hundred and fifty-six, inclusive; and also to include the surviving widows of such officers and enlisted men: *Provided*, That such widows have not remarried: *And provided further*, That where there is no record of enlistment or muster into the service of the United States in any of the wars mentioned in this act the records of pay by the United States shall be accepted as full and satisfactory proof of such enlistment and service.

It will be observed that the act of June 27, 1902, extends the provisions of the act of July 27, 1892, so as to include those persons—

who served for thirty days or more and were honorably discharged under the United States military, State, Territorial, or provisional authority in * * * the Oregon and Washington Territory Indian wars from eighteen hundred and fifty-one to eighteen hundred and fifty-six, inclusive.

It must be clear to the most casual observer that if this act means anything it means that the Congress intended to provide pension for the very class of persons who rendered the service that this claimant did. The act does not limit its provisions to those who served and were discharged under the immediate military authority of the United

States only, but its provisions clearly extend to those who served and were discharged under the other authorities named in the act.

The record shows that this claimant was enlisted, mustered, and honorably discharged by the authority specified in the act of June 27, 1902, and that he served more than thirty days. He therefore clearly comes within the provisions and meaning of the terms of said act. The rejection of the claim was therefore error, and the same is accordingly reversed.

You are directed to readjudicate this claim, allowing pension as provided by the act of June 27, 1902.

MARRIAGE AND DIVORCE—EVIDENCE—BURDEN OF PROOF—DIVISION OF PENSION—ACT MARCH 3, 1899.

STRUNK v. BUTTON AND STRUNK.

It is a rule of evidence recognized and enforced by the State and Federal courts generally, that a party attacking a duly established marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage, must not only prove a valid prior marriage, but also that it has not been dissolved at the time of the second marriage, even though it involves the proving of a negative; that every presumption is in favor of the validity of the established marriage, and these presumptions must be overcome by satisfactory irrefragable proof, the burden of proof being upon the party attacking the marriage.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, June 30, 1903.

Elias Strunk, late captain of Company K, Eighty-second U. S. Colored Volunteer Infantry, and a pensioner under certificate No. 983377, at \$12 per month, appealed May 29, 1903, from the Bureau action of May 5, 1903, wherein the Bureau allowed the claim of Sophia Strunk, filed December 9, 1901, for one-half his pension under the act of March 3, 1899, on the ground that he deserted her, she being his lawful wife, a person of good moral character and in necessitous circumstances.

On June 3, 1903, Jane B., a former wife of pensioner, joined with him in a supplemental appeal from the Bureau action of May 5, 1903, rejecting the claim of Jane B. Strunk, filed August 4, 1902, for one-half the pension of said pensioner, wherein the Bureau held that claimant had no title, as she was not the legal wife of pensioner.

The contention of pensioner in his appeal is, in brief, that said Sophia is not his wife; that she is not of good moral character or in necessitous circumstances, and that he did not desert her.

In the joint appeal of Jane B. and Elias Strunk it is contended that

the Bureau erred in finding that said Jane B. was not the lawful wife of pensioner.

The Bureau's report of the facts and the conclusions in these claims is as follows:

The undisputed facts disclosed by the evidence in these cases show that the soldier and Jane B. were lawfully married in New York, November 10, 1852, and lived together as husband and wife until he deserted her in 1868. The soldier, after his desertion of Jane B., instituted proceedings for divorce against her in the district court of Weber County, Territory of Utah, and obtained a decree in said court September 14, 1870, divorcing him from said Jane B., upon the ground of her willful desertion. The soldier, after his divorce from Jane B., contracted a second marriage, presumably in Illinois, with one Louise Kahler, about 1880, who was subsequently divorced from him May 16, 1894, by decree of Cook County, Ill. His third, and last marriage, of which we have any knowledge, was entered into at Racine, Wis., October 18, 1894, with claimant, Sophia. This claimant had been previously married to one Franklin N. Stow, who died April 12, 1892. The soldier lived with Sophia up to about May 18, 1901, when he deserted her and returned to Syracuse, N. Y., with his daughter, Georgiana, by his first wife, Jane B.; in whose immediate neighborhood he is now living.

The evidence further shows that claimant, Jane B., after desertion of soldier, and she not having heard from him for over twenty years, it appearing that a rumor of his previous death had been currently reported in the neighborhood of his original domicile, and believing him dead, in October, 1888, entered into a second marriage, bona fide, in New York, with one Dr. Jesse W. Button, and lived with him until his death in that State, December 19, 1900. It also appears that Dr. Button in his last will and testament, after deducting a bequest of \$300 to the Masonic Lodge at Cherry Creek, N. Y., left the residue of his estate to the claimant, Jane B. and one Georgia F. Barton, the daughter of said Jane B. by the soldier, share and share alike.

The claimant, Jane B., in April, 1902, procured a decree in the district court of Weber County, Utah, vacating the judgment of divorce previously granted soldier in said court under the Territory of Utah, in September, 1870, divorcing him from said Jane B.

The Bureau held that after a careful consideration of all the facts disclosed by the evidence in these contested claims, that the second marriage of the claimant, Jane B., to Dr. Jesse W. Button in 1888 should be accepted under the ruling of the Department in the case of Ann Green (12 P. D., 306) as having been a valid one, and, in consequence, that said Jane B. had no status as the lawful wife of soldier under the provisions of the act of March 3, 1899.

The Bureau further held that soldier's marriage to the claimant, Sophia, should be accepted as having been in all essentials a valid one, and that she should be regarded as having status as his lawful wife.

As the result of said holding by the Bureau, the claims were adjudicated as aforesaid, the claim of Sophia being allowed, and the claim of Jane B. being rejected.

It does not appear that the joint appeal of pensioner and said Jane B. Strunk was perfected as required by Rule 17 of Practice, by proof of service of a copy thereof upon the appellee, Sophia. This irregularity will, however, be waived in this case and said joint appeal will be considered in connection with the separate appeal of pensioner.

Sophia, the appellee, in answer to pensioner's appeal, contends that she contracted her marriage with him in good faith and lived openly with him as his wife in the city of Chicago up to the date of his desertion, fully believing then and now that she was and is his lawful wife; that she is unwilling to believe her said husband a bigamist; that his defense is contrary to the proven facts and the findings of the Bureau.

The question as to pensioner's matrimonial status is governed by the laws of New York, Wisconsin, and Illinois. Pensioner and his first wife, Jane B., are attacking the validity of pensioner's last marriage to Sophia, which marriage took place in Wisconsin and appears to have been a duly solemnized marriage in accordance with the laws of that State.

It is a rule of evidence, recognized and enforced by the States and Federal courts generally, that a party attacking a duly established marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage must not only prove a valid prior marriage, but also that it has not been dissolved in any manner at the time of the subsequent marriage, even though it involved the proving of a negative; that every presumption is in favor of the validity of the established marriage, and all these presumptions must be overcome by satisfactory, irrefragable proof, the burden of proof being upon the party attacking the marriage.

In the case of *United States v. Green* (98 Fed. Rep., 63) the question at issue was the validity of a second marriage, and the court held that it was not sufficient to prove a prior marriage of the husband, which had not been dissolved by death or divorce, in order to establish the illegality of the second marriage, but that the proof must go farther and show that the parties to the first marriage were lawfully competent to contract a marriage with each other. See departmental decisions in the cases of *Forbin v. Forbin* (13 P. D., 120) and authorities therein cited; *Ann Green* (12 P. D., 306); *Isabel W. Siler* (10 P. D., 1-5); *Jennette Burton* (9 P. D., 31); *Williams v. Williams* (46 Wis., 464); *Schmisseur v. Beatrice* (147 Ill., 201).

The attorney for appellants, in his brief and argument, invites attention to the provisions of sections 2330 and 2349, revised statutes of Wisconsin, which declare that no marriage shall be contracted while either of the parties has a husband or wife living, and if solemnized shall be absolutely void without any judgment of divorce or other legal proceedings.

Sections 2333 and 4594 provide that the party solemnizing any marriage shall examine at least one of the parties on oath, and shall in no case solemnize a marriage unless he is satisfied, from such examination, that there was no legal impediment thereto; that if any person authorized by law shall solemnize marriage with knowledge of a legal impediment to the proposed marriage he shall be punished by impris-

onment in the county jail for not more than one year or by fine not exceeding \$500.

The law presumes that officers perform their duties; that they do not violate the law. The law also presumes in favor of innocence, and this is one of the strongest presumptions known to the law.

It is further contended that a lawful marriage can not be dissolved by any act of the parties nor by the absence of one from the other for any period, or their believing in the death of one or the other; that nothing can dissolve it but the judgment of a competent court or the death of either one or the other of the parties.

The statutes of New York, however, provide:

If any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority. (Section 6, chapter 8, article 1, page 2332 rev. stat. New York.)

The New York courts have repeatedly held that marriages such as are provided for in said section 6 are voidable merely and not void where it is shown that the absent party is still alive, and that such marriages are valid until declared void on a proper application to a court of competent jurisdiction during the lifetime of the parties thereto; that unless so nullified within the lifetime of the parties to such marriage it is as legal in its origin and continuance as any other marriage. *Cropsey v. McKinney* (30 Barb., 47-55); *Jones v. Zoller* (29 Hun., 551); *White v. Lowe* (1 Red., F., 376); *Gall v. Gall* (114 N. Y., 109); *Griffin v. Banks* (24 How., 215); *Valleau v. Valleau* (6 Paige, 207); *Brower v. Brower* (1 Abb., Ct. App., 214); *Taylor v. Taylor* (25 N. Y. Misc., 566); *Ann Green* (12 P. D., 306).

The marriage of Jane B. Strunk to Dr. Jesse W. Button in New York in 1888 appears to have been legal and valid. No proceeding appears to have been taken to avoid said marriage during the lifetime of Dr. Button, and, in the language of the New York courts, said marriage must be deemed valid for all purposes. If pensioner should attempt to resume marital relations with said Jane B. Button he would subject himself to criminal prosecution under the laws of New York by reason of the valid subsisting marriage relation existing between him and Sophia.

So also the courts of Louisiana hold that a putative marriage is valid unless dissolved during the lifetime of the parties. See authorities cited in the recent case of *Peggy Thomas* (13 P. D., 98).

After careful consideration of all the facts in these cases and the laws applicable thereto the Department is of the opinion that the Bureau actions appealed from were fully in accord with the law and the facts, and said actions are accordingly affirmed.

MARRIAGE AND DIVORCE—EVIDENCE.

MARIA WHITE (WIDOW).

As soldier had a wife living from whom he had not been divorced at the time of his marriage to claimant, such marriage was null and void; and as soldier's first wife survived him, and neither ever having procured a divorce, there was no period of time when claimant and soldier could have been legally married, she is not his widow nor entitled to pension.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
June 30, 1903.*

George White, who served in Company A, Forty-sixth U. S. Colored Troops, died January 21, 1891. He never made any application for pension, but on December 10, 1894, one Maria, claiming to be his widow, filed a claim under the provisions of the act of June 27, 1890, alleging soldier's death and title under the act.

This claim was numbered 508819, and was rejected July 24, 1901, and reopening denied December 20, 1901. In an appeal filed February 8, 1902, the attorneys for the claimant contend that the evidence of witnesses shows the marriage of the claimant to the soldier December 30, 1871; that the absence of a public record has been supplemented by the evidence of witnesses who were present, and that as soldier and claimant lived together as husband and wife from the date of their marriage to the date of the soldier's death, she should have title. They call attention to the fact that evidence has been filed to the effect that claimant was not married prior to her marriage with the soldier, and that soldier was unmarried at the date of his marriage to the claimant.

As to both of these contentions the attorneys are in error, as will be hereinafter seen.

The following is a summary of the evidence found with the brief:

The claimant states that she was married to the soldier December 30, 1871, by Rev. Joseph Gould, at the Valinco Street Methodist Church, in New Orleans, La. She states no record was made, as records were not kept. The city records fail to show any marriage.

Dicey Robinson and Peggy Green testify to the claimant's marriage to the soldier in this church some time in 1871.

Elias Hollinsworth and Cary Norle testify that they were present at the marriage in the church. They state that soldier and the claimant belonged to this church with them.

Jack Valcom and Julia Smith testify that they were present at the wedding, December 30, 1871. They state that the church has since been burned and the pastor is dead.

Lemuel Thomas and Philip Benanry testify that soldier was never married before his marriage to the claimant.

Cyrus Gainer and J. W. Archer testify to the marriage and that there was neither divorce nor remarriage by either party.

Prosper Johnson testifies that neither the soldier nor the claimant were previously married. He was not present at the ceremony, but heard the pastor announce the marriage on the following Sunday.

Francis Green was not present, but knew of the marriage.

The following is the testimony presented on special examination:

Peggy Green, whose reputation is fair and whose evidence has been referred to hereinbefore, testified before the special examiner that when she first knew the claimant she was known as Maria Johnson. This was about 1870. She practically corroborates the facts stated in her affidavit, and the special examination developed clearly that this affiant was not a witness at the time the affidavit was made and that she did not certify to it, as purported.

Cyrus Gainer, whose testimony has been referred to above and whose reputation is good, is shown not to have made the affidavit found with the brief. It is also shown that the names of W. J. Aginor, John P. Thomas, jr., Dicey Robinson, and Peggy Green, attesting witnesses to affidavits and declarations, were forgeries. The attorney and the notary who prepared this evidence were convicted on a criminal trial.

It will be remembered that the claimant alleges in her declaration that neither she nor the soldier were previously married. On special examination she confesses that she was the widow of one Jack Johnson, also a soldier, she states, and who was killed in 1864. She also confesses that the soldier had a wife, Marceline Burks, prior to his marriage to her, and that Marceline and the soldier separated about a year before he married her (the claimant). She states that Marceline was living when she was married to the soldier.

Dicey Robinson testified, on special examination, that prior to claimant's marriage to the soldier she was known as Mrs. Johnson. This witness repudiates her signature to former affidavit; so does Cyrus Gainer, before the special examiner, as well as Peggy Green.

Julia Henderson testifies that claimant was known as Maria Johnson when she married the soldier. Victor Johnson testifies that the soldier's first wife was Marceline Burks. This wife visited the soldier while he was in the service, and he visited her during his service, and when he was discharged he went immediately back to live with her as her husband, and they lived in this relation for three or four years after the soldier's discharge. The claimant on special examination admits this to be a fact.

The witness Johnson also states that the soldier left Marceline and lived with Maria (claimant), and that the soldier was never divorced from Marceline, and he was lawfully married to her. Know this because Marceline showed him her marriage license. Heard Marceline died about 1895.

Rosite Jones knew soldier and his wife Marceline—was brought up with them. They lived together from about 1855 till four or five

years after the war. Soldier visited Marceline during service. As soon as soldier was discharged he came for Marceline and they went to New Orleans to live; visited them there. Five years after soldier's discharge Marceline told affiant soldier had left her for another woman (claimant). Marceline claimed she was lawfully married to soldier; showed her a paper which she said was her marriage license. I could not read but called a white boy who read it and said it was not a license but a certificate of marriage. Heard Marceline died about 1889; got the news by letter; not preserved. Marceline was never divorced from soldier. Marceline said she got sick and soldier would not take care of her because he had another woman.

James Broadnax knew soldier and his wife Marceline—raised with them. Soldier had Marceline for a wife prior to the war and came back to her after discharge. Visited her during service. Saw them together after service. Saw Marceline in Baton Rouge about 1896. Since heard she was dead. She was never divorced. Soldier told him he was lawfully married to Marceline. Mary Archer and J. W. Archer corroborate this.

Further, on special examination, claimant admits she was the slave wife of Jack Johnson, who left her during the war. She further admits that before peace was declared she "took up" with one Victor Gibbs. Was called Mrs. Gibbs—left him because he drank. Has never seen him since. She states that she had no other husband until she married White, the soldier, but on cross-examination by a special examiner she admits she did live with one George Washington as his wife after she left Gibbs. She thought he would make a good husband, but he turned out to be a bad man and she had to get rid of him. Heard he had died, but don't know. Was known by some as Mrs. Washington.

The special examiner confronted claimant with George Washington, her former husband, whom she identified.

George Washington proceeded to question the witness (claimant), and asked her if she had not stood up with him and had the marriage service read between them. Claimant denied this, but stated she knew of no reason why he would misstate such a fact.

Washington states on special examination he met claimant a year and a half after the war closed; took her from the place where she worked, and was married in the quarters he had rented for her. They were married by the pastor of the Valence Street Methodist Church. Washington states further that he secured a license from the recorder's court, and he names a witness who went with him to get the license and the witnesses to the ceremony, now dead. He was free to marry. Claimant's employer at this time, an estimable gentleman, states claimant lived on his place with Washington, whom she claimed as her husband.

It is clear that soldier had in Marceline a lawful wife, not only by

proper ceremony, but this union conformed to the laws of the State in which the parties lived as well as to the provisions of the laws of the United States, section 4705, Revised Statutes, United States. Further, it appears soldier and Marceline lived together for years prior to the war, recognized each other and were recognized by others as husband and wife during the soldier's service, and he returned to her and claimed her as his wife after discharge, and lived with her as her recognized husband for several years thereafter.

Soldier being Marceline's legal husband it does not appear that a legal separation was ever procured.

Even had there been no formal legal union between this soldier and Marceline, it is shown that they cohabited for years under color and claim of marriage, which is sufficient proof, under the decisions of the courts of Louisiana, of a valid marriage in that State. See *Minna Wilson* (11 P. D., 339). And as Marceline apparently survived the soldier, there was no period of time during his life, and since his cohabitation with this appellant, when he might have contracted a legal marriage with her, nor even a putative one, as neither he nor appellant appears to have married, or assumed to marry, in good faith. See *Peggy Thomas* (13 P. D., 98).

Therefore the soldier's valid and undissolved union with Marceline is a bar to claimant's title.

It is consequently unnecessary to discuss the fact that claimant had three matrimonial ventures beside the one with the soldier, and even should there be held to be a presumption that Johnson and Gibbs, her prior husbands, were dead it is in evidence that she was lawfully married to George Washington, who is still alive and undivorced.

The rejection was well founded and is sustained on appeal.

LIMITATION—ACT MARCH 3, 1879—MINORS.

MINORS OF JAMES F. BURKHEAD.

1. The words "children under sixteen years of age," as used in the exception to the proviso to section 2 of the act of March 3, 1879, mean children of the soldier on account of whose service and death pension is claimed, who were under the age of 16 years at the time of his death, or at the date of the death or remarriage of his widow, and not to children who are under 16 years of age when they apply for such pension.
2. Children of a soldier who were at any time prior to arriving at the age of 16 years entitled to pension on account of the service and death of their father from a cause arising in the service and in line of duty, by reason of the exception to the limitation contained in the proviso in section 2 of the act of March 3, 1879, may apply for and receive such pension even after arriving at the age of 16 years. (Citing cases of *Caroline Fritsche*, 8 P. D., o. s., 196; *Secretary Teller's instructions*, March 3, 1885; *Thomas W. Baugher*, 7 P. D., 433; *James H. Hawksley*, 6 L. B. P., 454; *Cornelia A. Nyland*, 3 P. D., o. s., 256; *Eli Phipps*, 8 P. D., 111.) *Instructions* (10 P. D., 465) overruled.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 29, 1903.*

Your letter of May 4, 1903, addressed to the honorable Secretary, and your opinion at length accompanying the same, construing the Statutes relative to the pensionable rights of minor children of deceased soldiers, have been given careful consideration and your view of the law has my hearty concurrence.

You have given a clear and concise history of legislation on behalf of minor children, in chronological order, and your construction of the law is well fortified by numerous citations of high authority.

You have also well stated, relative to the limitation prescribed in the act of March 3, 1879, known as the "Arrears act," that the Department has uniformly held that there was no limitation as to the date upon which a minor could file a claim for pension; "that the child of a soldier whose right accrued prior to the date when it reached the age of 16 years was not barred from filing an application after it reached such age. In other words, even though the child has passed the age of 16 years without making an application, it could thereafter apply and receive pension, etc."

It may be added that there has been no Departmental ruling or order in conflict with the foregoing since the passage of the act of March 3, 1879.

It is therefore deemed unnecessary to reiterate the conclusions reached in former Departmental decisions rendered, to which you invite attention, and in which you concur.

Your recommendation that the order of the Department dated May 26, 1900 (10 P. D., 465), be revoked is approved, with the instructions that the adjudication of this class of suspended claims be resumed accordingly.

The papers in the claim of the minor children of James F. Burkhead, late of Company G, One hundred and seventy-eighth Ohio Volunteer Infantry, are herewith returned.

Approved:

THOS. RYAN, *Acting Secretary.*

The following are the communications before referred to. (Ed.)

DEPARTMENT OF THE INTERIOR, WASHINGTON,
BUREAU OF PENSIONS, *May 4, 1903.*

THE SECRETARY OF THE INTERIOR.

DEAR SIR: In a letter dated April 29, 1898, the Commissioner of Pensions invited your attention to the law and practice relative to claims for minors' pensions, setting forth wherein it was believed by him that the intent of the law had been misconstrued in holding that

there was no limitation to the date of filing of claims of children who were 16 years of age prior to July 1, 1880.

Afterwards an order was made by you, dated May 26, 1900 (10 P. D., 465), suspending the adjudication of such claims and suggesting Congressional action. The matter has been referred to Congress, but it has neglected to take action thereon. In the meantime many claims have been presented and pressed, and I have been obliged to give the matter considerable attention. I am forced to say that I have reached a conclusion at variance from that of my predecessor.

I respectfully submit herewith the case of Cora A. Burkhead, No. 522957, together with all papers thereto appertaining, and I also inclose herewith an opinion based on the law and facts, and invoke your consideration thereof to the end that if you confirm my judgment and revoke the order of May 26, 1900, the Bureau may be enabled to dispose of the cases involving the same question which have accumulated during the past three years.

Very respectfully,

E. F. WARE, *Commissioner*.

DEPARTMENT OF THE INTERIOR, BUREAU OF PENSIONS.

[Minors' Certificate No. 522957, minor children of James F. Burkhead, Company G, One hundred and seventy-eighth Ohio Volunteer Infantry.]

LIMITATION—ACT MARCH 3, 1879—MINORS.

The soldier above named enlisted August 30, 1864, and performed active service until February 2, 1865, when he was stricken with pneumonia, succeeded by bronchitis of so severe a character as to cause convulsions, from which he was suffering when discharged the service, on June 20, 1865. He continued to suffer from disease of lungs after his discharge, and died from that cause on April 9, 1875, leaving a widow, to whom he was married October 23, 1860.

Six children were the issue of this marriage, one of whom died prior to the death of the soldier, the youngest having been born shortly after the soldier's death, on June 26, 1875.

The widow died one year and eight months after the date of soldier's death, and neither she nor the soldier ever filed an application for pension, although it is clear from the testimony in the case that they were both entitled thereto.

At the time of the widow's death, December 10, 1876, four children of the soldier under 16 years of age survived her—Cora A., born February 10, 1864; Ella O., born April 9, 1866; Pearl I., born April 26, 1868, and Jennie F., born June 26, 1875.

On April 23, 1900, the above-named children of the soldier filed a claim for minors' pension, under the acts of July 4, 1862, and March 3, 1873, and under certificate issued November 16, 1901, they were

allowed pension at \$8 per month from April 9, 1875, date of soldier's death, and \$12 per month from March 19, 1886, date of act fixing that rate (24 Stat. L., 5), with \$2 per month additional for each child (14 Stat. L., 230).

Under this allowance it was admitted that each of the minors was entitled to pension up to the date when they severally reached the age of 16 years, and the amounts allowed and admitted to be due each of them is as follows:

Name.	Termination.	Original.	\$2 additional.
Cora A.....	Feb. 9, 1880	\$116.00	\$116.07
Ella O.....	Apr. 8, 1882	185.24	168.00
Pearl I.....	Apr. 25, 1884	283.51	217.13
Jennie F.....	June 25, 1891	1,224.71	384.00
		1,809.46	885.20

The above total of \$1,809.46, allowed as original pension, and that of \$885.20, \$2 additional on account of each minor, constitute a grand total of \$2,694.66 allowed on behalf of all of said children.

The shares of this pension granted on account of Ella O., Pearl I., and Jennie F., amounting to \$2,462.59, have been paid, and the amount to which Cora A. is entitled, \$232.07, has been withheld, under orders of the Department made May 26, 1900, and January 14, 1901, she having reached the age of 16 years prior to July 1, 1880, and not having filed an application prior to that date.

The question now arises as to the correctness of the action in withholding the amount of pension allowed Cora A., or, in other words, Is there a limitation as to the date of filing claims for minors' pension under the provisions of the acts of July 4, 1862, and March 3, 1873, and the acts amendatory thereto?

It should be borne in mind that if it is decided that Cora A. has no title to pension, \$116 of the original pension which has been withheld will be distributed among the other three children, the balance, \$116.07, granted on account of \$2 additional to the minor, reverting to the United States.

When children, under sixteen years, of a deceased soldier, are entitled to pension, and one or more of them dies, "the pension in its entirety survives and will be paid to the survivor."

The whole pension "is given to the offspring of the father (the soldier) as a class. If there is more than one child, they have a joint estate (so to speak) in the pension. The statute (sec. 4702) disposes of the whole. No part of it reverts or falls back to the Government until the last child arrives at the age of sixteen years or until his death before reaching that age."

Boone, Alexander, minors of. Cert. No. 182930. Opinion of Attorney-General, Apr. 28, 1882. Teller, H. M., Secretary, May 11, 1882, vol. 9, pp. 186 and 191.

The principle herein enunciated applies with equal force to the case under consideration.

The causes which led to the action of the withholding of the pension from Cora A. in this case were brought about by my predecessor, who, in a letter dated April 29, 1898, invited the attention of the Department to the law and practice relative to claims for minors' pension under the provisions of the acts of July 14, 1862, and March 3, 1873, and acts amendatory thereto. It was believed by him that the intent of the law had been misconstrued in holding that there was no limitation as to the date of filing that class of claims. Said letter discussed at length the principles involved, and set forth the grounds on which it was believed that the practice which obtained in such matters was contrary to law. After this letter had been written and considered by the Department it was deemed proper to withhold the adjudication of certain minors' claims pending a decision upon the points involved, and the subject was referred to Congress, recommending certain legislation looking toward a method by which the issue would be judicially determined and set at rest. Congress adjourned without acting.

The matter has recently been considered by me, and after a careful examination of the law a conclusion has been reached at variance with that expressed by my predecessor, and the matter is presented here, hoping that a decision may be reached which will enable the Bureau to finally dispose of the class of cases under consideration.

In determining the intent of the law on the point at issue it is necessary to consider all laws providing for the granting of pension to widows as well as minors by reason of death occurring as a result of soldier's service since March 4, 1861, as the status of the minor is usually dependent upon the death, remarriage, or deprivation of title of the widow, and since, with the one single exception given below, Congress has seen fit to legislate in behalf of widows and minors in the same acts—in fact, has found it necessary to do so—for by no other method could the laws have been clearly drawn to show from what date the widow would cease to have, and the minors would gain, status.

The foundation of all laws granting such pensions is in section 2, act of July 14, 1862 (12 Stat. L., 567), providing for the granting of pensions in cases where any officer or other person named in section 1 of said act has died since March 4, 1861, or shall thereafter die by reason of any wound received or disease contracted while in the service of the United States and line of duty, to his widow, or, if there be no widow, to his child or children under 16 years of age, who shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the date of the death of the husband or father, and to continue to the widow during her widowhood, or to the child or children until they severally attain the age of 16.

Section 5 of said act provides that in cases in which the application is not filed within one year after date of discharge or death, pension shall commence on the date of the filing of the application. This—the original limitation—applied to all classes of cases alike, and barred from the pension roll children who attained the age of 16 years before their applications were filed, if such applications were not filed within one year after the date of the soldier's death.

Section 6 of the act of July 4, 1864 (13 Stat. L., 387), provided that no claim then on file, unless prosecuted to a successful issue within three years from the date of said act, and no claim thereafter filed, unless prosecuted to a successful issue within five years, should be admitted without satisfactory evidence from the War Department to establish the same, and that in every case not filed within three years after discharge or death of soldier, pension should commence from the date of filing last paper. This limitation applied to all classes of claims and made no exception in behalf of minor children.

Section 4 of the act of March 3, 1865 (13 Stat. L., 499), amplified the laws providing for minors by granting to such children pensions from the death or remarriage of a widow who was a pensioner, and reenacted the limitation as to date of filing and commencement in section 6 of the act of July 14, 1864.

Section 11 of the act of June 6, 1866 (14 Stat. L., 58), providing for diverting to minors the pension of a widow who deserted her children or who had been judicially determined to be, by reason of immoral conduct, an unfit person to have the children in her custody.

Section 2 of the act of July 25, 1866 (14 Stat. L., 230), granted to widows \$2 per month additional for each legitimate minor child under the age of 16 and granted a like increase to minors pensioned in their own right.

Section 4 of the act of July 27, 1868 (15 Stat. L., 235), granted a similar rate for the children of a soldier by a former wife who were not in the custody of a pensioned widow.

Section 6 of the act of July 27, 1868 (15 Stat. L., 236), amended the limitation as to the date of filing and commencement of the claims of widows and minors by providing that pension should commence from the date of death of the husband or father, provided the application was filed within five years after the right accrued, except that any application by or in behalf of insane persons and children under 16 years of age may be filed after the expiration of said five years if previously thereto they were without guardians or other legal representatives. This is the first recognition by Congress in legislation of this character that, in justice and equity, those who were bereft of reason or were infants should not be deprived of that to which they were entitled by their failure to claim within a specified period.

Section 15 of the act of March 3, 1878 (17 Stat. L., 572), further amplifies and extends the exception in behalf of minor children by providing that the limitation therein prescribed should not apply to claims by or in behalf of insane persons or children, under 16 years of age, striking out the words "who were without guardians or other legal representatives."

In framing the act of July 27, 1868, Congress was unquestionably governed by the theory that while minor children, by reason of their infancy, could not be expected to know and avail themselves of the benefits of the law, if they had guardians or other representatives, it was the duty of such representatives to apply in their behalf, and if they failed to do so the limitation should not be lifted; but in practice this was found to be unjust and to punish the innocent infant for the laches of another, and hence, in framing the act of March 3, 1873, the distinction between the infant with and the infant without a guardian was wiped out and the limitation as to the filing of all minors' claims was removed, thereby placing such claims, so far as the date of filing thereof was concerned, in the same category as the claims of insane persons, for the very sound reason that for all practical intents and purposes the infant is, in the eyes of the law, as incapable of protecting his own interests as is a person who is bereft of reason. The legal disability in the case of an infant, as such, ceased to exist when the infant attained his majority, took his place among men, and became capable of asserting and maintaining his own rights, and hence it was only when he had attained his majority that he possessed, in the full legal sense, status to execute a declaration for pension. This last-mentioned act removed all limitation as to the date of the filing of the claims of minor children of soldiers and sailors, and from the date of its approval until April 29, 1898, that construction of the law governed the adjudication of all claims.

The act of January 25, 1879 (20 Stat. L., 265), granted arrears in all adjudicated cases on account of death from causes which originated while in the service subsequent to March 4, 1861.

The act of March 3, 1879 (20 Stat. L., 469), repealed all limitation as to the date of filing of claims then before the Office, and established a new limitation by providing that in all cases filed subsequent to June 30, 1880, pension should commence from date of filing, and expressly provided that the limitation therein prescribed should not apply to claims by or in behalf of insane persons and children under 16 years of age.

The act of June 7, 1888 (25 Stat. L., 173), removes the limitation in widows' cases, by providing that in all such cases where death occurred from a cause which originated in the service since March 4, 1861, pension shall commence from the date of the death of the husband. This act does not mention the cases of minors for the sufficient reason that

under the laws then in force, and the rulings and practice based thereon, there was no limitation as to the date of the filing of the declaration of minors, and consequently there was no necessity for legislation relative thereto.

The laws in force governing the claim under consideration on the date when the right of the minors to make application accrued, i. e., December 10, 1876, were section 4702 and section 4709 of the Revised Statutes, which are here set forth in full:

If any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or hereafter dies by reason of any wound, injury, or disease, which, under the conditions and limitations of such sections, would have entitled him to an invalid pension had he been disabled, his widow, or if there be no widow, or in case of her death, without payment to her of any part of the pension hereinafter mentioned, his child or children, under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the death of the husband or father, to continue to the widow during her widowhood, and to his child or children until they severally attain the age of sixteen years, and no longer; and, if the widow remarry, the child or children shall be entitled from the date of remarriage. (Sec. 4702, R. S. U. S.)

All pensions which have been, or which may hereafter be, granted in consequence of death occurring from a cause which originated in the service since the fourth day of March, eighteen hundred and sixty-one, or in consequence of wounds or injuries received or disease contracted since that date, shall commence from the death or discharge of the person on whose account the claim has been, or is hereafter granted, or from the termination of the right of party having prior title to such pension; provided the application for such pension has been or is hereafter filed with the Commissioner of Pensions within five years after the right thereto has accrued; otherwise the pension shall commence from the date of filing the last evidence necessary to establish the same. But the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under sixteen years. (Sec. 4709, R. S. U. S.)

Subsequently, on March 3, 1879, an act was passed creating a new limitation as to the date of commencement in all claims, repealing the provisions of section 4709 of the Revised Statutes, but reenacting, in the same words, the exception contained in said section 4709 relating to the claims of insane persons and children under the age of 16 years. Section 2 of said act of March 3, 1879, which is the only portion thereof that need be considered in connection with this case, is as follows:

All pensions which have been, or which may hereafter be, granted in consequence of death occurring from a cause which originated in the service since the fourth day of March, eighteen hundred and sixty-one, or in consequence of wounds or injuries received or disease contracted since that date, shall commence from the death or discharge of the person on whose account the claim has been or is hereafter granted, if the disability occurred prior to discharge; and if such disability occurred after the discharge, then from the date of actual disability, or from the termination of the right of party having prior title to such pension: *Provided*, The application for such pension has been or is hereafter filed with the Commissioner of Pensions prior to the

first day of July, eighteen hundred and eighty, otherwise the pension shall commence from the date of filing the application; but the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under sixteen years of age. (20 Stat. L., 469.)

Again, on August 7, 1882, section 4702 of the Revised Statutes was amended, and the only portion thereof which is applicable to the matter under consideration is section 1, which is set forth in full:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section forty-seven hundred and two, title fifty-seven of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Sec. 4702. If any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three, has died since the fourth day of March, eighteen hundred and sixty-one, or hereafter dies, by reason of any wound, injury, or disease which under the conditions and limitations of such sections would have entitled him to an invalid pension had he been disabled, his widow, or if there be no widow, or in the case of her death without payment to her of any part of the pension hereinafter mentioned, his child, or children under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the death of the husband or father, to continue to the widow during her widowhood, and to his child or children until they severally attain the age of sixteen years, and no longer; and if the widow remarry, the child or children shall be entitled from the date of remarriage, except when such widow has continued to draw the pension money after her re-marriage, in contravention of law, and such child or children have resided with and been supported by her, their pension will commence at the date to which the widow was last paid." (22 Stat. L., 345.)

On April 23, 1900, when the minor's claim was filed, the laws in force under which this claim was adjudicated were section 4702, Revised Statutes (as amended by the act of August 7, 1882), and the act of March 3, 1879, above set forth.

Attention is here called to the exception to the limitation made in behalf of insane persons and children under the age of 16 years, in the different acts, beginning with the first exemption, which is contained in section 6 of the act of July 27, 1868, and is as follows:

Provided, That the application for such pension shall have been or shall hereafter be filed with the Commissioner of Pensions within five years after the right thereto shall have accrued, except that applications by or in behalf of insane persons and children under sixteen years of age may be filed after the expiration of said five years, if previously thereto they were without guardians or other proper legal representatives.

On February 4, 1869, in the case of the child of James H. Hawksley (6 L. B. P., 454), Secretary Browning held:

Where a soldier dies leaving no widow but a minor child, such child is pensionable, although it does not file its application until it has attained its sixteenth year; and if he dies leaving a widow and minor child, such child is pensionable on the remarriage or death of the widow, although it does not apply until after it is 16 years of age.

The next exemption from the limitation is contained in section 4709 of the Revised Statutes, and is as follows:

* * * But the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under 16 years.

. The meaning and effect of the above-quoted exception to the limitation in behalf of insane persons and children under 16 years of age have been passed upon by the Department in numerous cases; and it has been uniformly held that the child of a soldier whose right accrued prior to the date when it reached the age of 16 years was not barred from filing an application after it reached such age. In other words, even though the child had passed the age of 16 years without making application, it could thereafter apply and receive pension from the date of the death of the father or the death or remarriage of the mother, up to the date when it reached the age of 16 years. (Case of John Pelow, decided by Secretary Chandler, March 2, 1877; Case of Cornelia E. Nyland, 3 P. D., o. s., 256, decided by Secretary Chandler, April 27, 1876; and Case of M. C. Irving, decided by Secretary Chandler, January 26, 1876, and February 24, 1876.)

The same interpretation continued to be placed upon the exception up to the time section 4709 was repealed by the act of March 3, 1879.

The exception to the limitation in the act of March 3, 1879, is as follows:

* * * But the limitation herein prescribed shall not apply to claims by or on behalf of insane persons or children under 16 years of age.

This exception was a reenactment of the one contained in section 4709, with the addition of the words "of age," which in no sense changes the meaning of the clause.

The phrase in section 4709, Revised Statutes, exempting from the limitation the claims of insane persons and children under 16 years of age, having received a definite construction by the officers charged by Congress with the administration of the law, the Congress, when it legislated, on March 3, 1879, fixing the new limitation in all claims, and exempting from the limitation the claims of insane persons and minor children under the age of 16 years, in the same words as were used in section 4709, must be presumed to have known what that construction was, and to have reenacted the same clause in the act of March 3, 1879, with a full understanding as to what its effect would be in relation to claims like the one at bar.

The importance in the construction of a statute of a comparison of the same with the earlier statutes in *pari materia* has already been pointed out. A recourse to such statutes, however, necessarily involves a recourse to the construction placed upon them by the courts; for such decisions become virtually a part of the law, and, aside from this consideration, as the comparison of former acts in *pari materia* proceeds upon and is justified and demanded by the principle that the legislature can not be

presumed ignorant of previous legislation, so a recourse to a construction put by the courts upon words used in such acts is based upon the reasonable assumption that where the legislature has reproduced language upon which a case has been decided, it must have known the interpretation put upon them in that decision. It is but a corollary to this assumption that where cases have been decided on particular forms of words in courts of justice, and those forms of words are then used in legislative enactments, the legislature, in the absence of anything in the statutes showing that it did not mean to use them in the sense attributed to them by such judicial construction, must be presumed to have used them in that sense. It may be taken for granted that the legislature is acquainted with any construction which has been put on a statute by judicial authority. Therefore, when the words of an old statute are either transcribed into or by reference made a part of a new statute, this is understood to be done with the object of adopting any legal interpretation which has been put on them by the courts. (Endlich on the Interpretation of Statutes, sec. 367.)

Where the terms of a statute which has received a judicial construction are used in a later statute, whether passed by the legislature of the same State or country, or by that of another, that construction is to be given to the later statute; for if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effectuate that intention. (Sutherland on Statutory Construction, 420.)

When the words in an act have acquired, through judicial interpretation, a definite meaning, they will, when found in a subsequent act, be presumed to be used in the same sense, unless a contrary intention appears from the act. The "Abbotsford" (98 U. S., 440).

When this court has given a construction to relative provisions in different parts of a statute, and Congress then makes a new enactment respecting the same subject-matter, with provisions in different sections bearing like relations to each other, and without indicating a purpose to vary from that construction, the court is bound to construe the two provisions in the different sections of the new statute in the same sense which, in previous statutes, had uniformly been given to them, and not invent a new application and relation of the two clauses. *Claffin and Others v. Commonwealth Insurance Company* (110 U. S., 81).

Where a statute granting pensions has received a settled construction by the Commissioner of Pensions, and several subsequent acts of Congress manifest the intention of that body to adopt the departmental construction, the courts will not interpret the statutes differently. *United States v. Alexander* (12 Wallace, 177).

When the words in a statute have acquired, through judicial interpretation, a well-understood judicial meaning, it is to be presumed that they were used in that sense in a subsequent statute on the same subject unless the contrary appears. *Daniel v. Simms* (49 W. Va., 554).

In enacting statutes the legislature will be presumed to have legislated with a reference to the construction given to the former statute, conceived in substantially the same language, and in the absence of a legislative rule, the decisions on the former act furnish the rule of construction for the latter. *State v. Swope* (11 Ind., 91).

The legislature, in reenacting a statute substantially in the terms of a former statute, which had been judicially considered, will be presumed to have put that construction on the statute which the prior act had received. *Ex parte Mathews* (22 Ala., 51).

Statutes in *pari materia* are to be construed together as if a provision in one statute receives a judicial construction and it is inserted in another, the same construction would be given to it, but where the clause varies it shows a different intention of the legislature. *Rutland v. Mendon* (1 Pick., 155).

The reenactment of a statute after a judicial construction of its meaning must be regarded as a legislative adoption of the statute as thus construed. *Tuxbury's Appeal* (67 Maine, 267).

When a statute has received a judicial construction in the court of the State where it was in force, and the same statute has been reenacted with the same provision which has been the subject of judicial discussion and decision, the legislature are understood to have adopted the construction given by the courts. *Myrick v. Hasey* (27 Me., 17).

It is an established legal maxim that when the legislature adopts or reenacts a statute the previous construction of the statute, as settled by the courts of law, is adopted. *Tomson v. Ward* (1 N. H., 12).

It is by no means an inconvenient mode of construing statutes to presume that the legislature was aware of the state of the law at the time they were passed. If, then, the law was that by the use of such and such words the privilege in question was not taken away, and the legislature passed an act in which similar language is used, why are we to presume that they intended more by the new statute than the old? *Jones v. Brown* (2 Ex. Reports, Wellsby, Hurlstone Gordon, 329).

The substantial reenactment of a former statute which had been formerly construed is a legislative adoption of that judicial construction. *Huddleston v. Askey* (56 Ala., 218).

Prior to August 7, 1882, the Department passed directly upon the meaning of the exception to limitation in behalf of minor children contained in the act of March 3, 1879:

Should a claim, however, be filed in behalf of the children of George Weigart as minors, it would be entitled to consideration, it matters not what their age now is, and should it be proven that their father's death was due to the service, they would, under the last clause of the proviso of section 2 of the act of March 3, 1879, be entitled to pension, as provided in section 4702 of the Revised Statutes, for the period from the date of the widow's (their mother's) remarriage until they severally attained the age of 16 years. (Case of Karoline Fritsche (8 P. D., o. s., 196), decided by Acting Secretary of the Interior Bell on May 19, 1881);

and the Bureau, knowing what the views of the Department were as to the meaning of the last clause of the proviso in the act of March 3, 1879, recognized that there was no limitation in the case of minors.

No statute of limitation runs against minors, therefore their rights are not affected by the time of filing an application in any case. (Practice of the Pension Bureau issued in 1882 by order of Commissioner Dudley, dated August 1, 1882.)

With this known construction placed upon the provision under consideration of the act of March 3, 1879, Congress, on August 7, 1882, amended section 4702, by reenacting that section in its entirety, and added the following:

* * * Except when such widow has continued to draw the pension money after her remarriage, in contravention of law, and such child or children have resided with and been supported by her, their pension will commence at the date to which the widow was last paid.

The reenactment by Congress of section 4702, on August 7, 1882, in view of the fact that Congress is presumed to know the state of the law in existence at the time it legislates, must be accepted as a legislative approval of the construction that had been placed upon other laws in *pari materia*.

Thus far it will be seen that the Bureau and Department have accepted the law to mean that there had been no bar to the filing of a

claim by a minor over 16 years of age after the limitation was removed by the act of March 3, 1873, and Congress legislated with presumably full knowledge of the effect that had been given to the laws, and in enacting statutes bearing upon the same subject, used no language that can be construed to warrant a change in the practice from what it was at the time Congress last had these laws under consideration.

With the exception of a short time during 1893, and this, a Commissioner's ruling in violation of Departmental decisions, the construction placed upon the acts in question by the Department has been that there was no limitation as to the date upon which a minor could file a claim for pension. The ruling has been, in effect, with the single exception noted, that the right of a minor having once accrued, it could not be defeated by lapse of time, but could be taken advantage of either before or after the child arrived at the age of 16 years.

Where a widow and a child under 16 years of age survive the soldier, and the widow remarries after the child has reached that age, and then dies, without having been paid any part of the pension, the child is entitled from soldier's death until he arrives at the age of 16 years. (Construction by Secretary Teller, March 3, 1885.)

The exception contained in the proviso of the second section of the act of March 3, 1879, which declares the limitation therein contained shall not apply to claims by or in behalf of children under 16 years of age, is descriptive of a class of claims wherein title has accrued by reason of minority at the date of the father's death, and does not limit the pensionable period and age during which said minors must apply. Such claims are excepted from all limitations, and are not forfeited by neglect to apply during the period of pensionable minority. (Minors of Thomas W. Baugher (7 P. D., 433), Assistant Secretary Reynolds, April 17, 1895.)

The last-cited decision has continued to be the view of the Department upon the question in controversy up to the present time.

In the case of the minors of Eli Phipps (8 P. D., 111), Assistant Secretary Reynolds, on March 30, 1896, held:

Where a soldier dies, leaving a widow and minor children under the age of 16 years surviving him, such children may, under section 4702, Revised Statutes of the United States, after attaining the age of 16 years, and where death of their mother occurs thereafter without payment to her of any part of the pension, apply in their own right and receive the same pension as the father would have been entitled to had he been totally disabled, to commence from the date of his death and to continue until they respectively arrive at the age of 16 years;

and, in discussing the proposition, states:

A question similar in principle arose under section 4718, Revised Statutes, which provides that when any person entitled to a pension shall die while his application is pending—

His widow, or, if there be no widow, the child or children of such person under the age of 16 years, shall be entitled to receive the accrued pension to the date of the death of such person * * * and if no widow or child survive, no payment whatsoever of the accrued pension shall be made or allowed. * * *

Francis Thierry died while his claim for pension was pending, leaving a daughter under 16 years of age and a widow. After the daughter arrived at the age of 16 years the mother died, and still later the pension was allowed and certificate therefor was issued.

Under date of August 12, 1881, the Attorney-General rendered an opinion, which contains the following:

If the mother had died before the father there would be no question as to the child's rights; if the widow had survived until the time came for payment there would be no question as to her right. The peculiarity of the case is that there was a widow at the time of the death of the claimant, and there is none now when payment is to be made. In determining whether this fact should prevent payment of the pension to the child no aid is obtainable from the original statute, and, as the revision is not explicit, we are left to the reason and spirit of the law for its interpretation. I can not imagine any reason why the child should receive the accrued pension where the claimant survived that would not apply with equal force to a case where the death of a mother intervened between that of the claimant and the allowance of the pension. The prohibitory clause of the statute is limited to where "no widow or child survive," meaning, of course, "no widow or child under 16 years of age." Here a child who was under 16 years of age at the death of the claimant has survived until the allowance of the pension.

The purpose of the statute was to give the accrued pension to the widow or the child; and, in my opinion, at the death of the father each acquired a distinct contingent interest; the widow's being contingent on her survival until allowance and payment, the child's being contingent on the death of the mother prior to, and its own survival until, payment. (Opinions of Attorney-General, Vol. XVII, p. 192.)

The principle here announced is applicable to the case of minor children under section 4702; and, in view of the previous holdings of the Department and the plain terms of the statute, it is believed that the rule of practice heretofore announced should be sustained.

From March 3, 1873, to April 29, 1898 (the date of my predecessor's letter to the Department), the claims of minors, with the one exception noted, were adjudicated upon the theory that there was no limitation as to the date of filing the declaration, and pensions were allowed therein from the date upon which the minor's status accrued. Estimates for appropriations were made upon that basis; Congress provided for the payment of pensions on that basis, and there was no rule more firmly established and more clearly an integral part of the pension system than was the practice in this regard. It had the sanction of years of usage; was based upon the law itself, and was firmly established with at least the implied consent of Congress.

Let us now turn again to the decision rendered by the Department in the Baugher case (7 P. D., 433), hereinbefore cited.

This decision has never been overruled, and its lucid and comprehensive reasoning commends itself to every one who reads it. It is worth while to carefully examine the Baugher case, because an understanding of it will clear up all doubts that may arise in examining the law of March 3, 1879.

The doubts that have arisen have grown out of the fact that the phrase "children under 16 years of age" was believed to apply to individuals with reference to the date of the act rather than to a class. The phrase quoted has, in fact, reference to a class as a class.

The whole pension is given to the offspring of the father (the soldier) as a class. (Boone case, *supra*.)

Claims by or in behalf of children under 16 years of age is descriptive of a class of claims. (See Baugher case, *supra*.)

For purposes of illustration let us abbreviate the phrase "children under 16 years of age," and make a class and call such children "dependent orphans." Having given the class a name, let us then substitute the class name for the phrase found in the law. The law will then read:

* * * But the limitation herein prescribed shall not apply to claims by or on behalf of (a) insane persons or (b) dependent orphans.

It is readily seen that where the class idea is applied to the term used in the law of March 3, 1879, there can be no possible doubt as to the interpretation. The law was intended to except from its application the claims of two classes who were under legal disability, viz, (1) insane people; (2) certain minor children.

The Department having, for over twenty-five years, consistently held that the claims of minor children were exempt from limitation, and the act of March 3, 1879, having been held, until recently, to have expressly exempted claims filed by or in behalf of children under the age of 16 years, it would seem that the former practice, now suspended, should be restored.

It is recommended that the order of the Department of May 26, 1900 (10 P. D., 465), be abrogated, and that the Bureau be directed to proceed with the adjudication of the suspended claims.

E. F. WARE, *Commissioner*.

MARRIAGE—WEST VIRGINIA—ACT AUGUST 7, 1882.

MAZILLA LESTER (AS WIDOW).

Claimant married soldier by ceremony while he had a living and undivorced wife.

A divorce was obtained from soldier by the first wife three months after he married claimant. No further marriage took place between soldier and claimant after the impediment was removed.

Held, Claimant is not the widow of soldier. Common law marriages are invalid in the State of West Virginia if contracted in said State. (*Beverlin v. Beverlin*, 29 W. Va., 723.)

Assistant Secretary M. W. Miller to the Commissioner of Pensions, July 29, 1903.

Mazilla, as widow of James Lester, formerly a private in Company B, Seventh West Virginia Volunteer Infantry, filed her application under the general law on April 17, 1901, claim being rejected February 20, 1902, on the ground that claimant was not the widow of the soldier in question. An appeal was filed March 19, 1902.

The facts in the case are as follows: The soldier had been married to one Catherine, and afterwards, during the lifetime of Catherine,

married the claimant by ceremony in the State of West Virginia, on July 13, 1865. On the 28th day of October, 1865, Catherine obtained a decree of divorce from soldier on the ground of adultery. The claimant swears that soldier told her prior to their marriage that he had already obtained a divorce from his first wife, and that she was not aware of the true state of facts until after his death, which occurred April 5, 1901.

The ceremonial marriage of claimant and soldier was null and void for the reason that soldier had at the time a living and undivorced wife, and it only remains to discover, under the act of August 7, 1882, what is the law of the State of West Virginia as to such a domestic relation as is herein shown to have existed.

In the case of *Beverlin v. Beverlin* (29 W. Va., 723) the facts were as follows: One Elizabeth married Foster in 1837; in June, 1861, she married Beverlin. At that date divorce proceedings had been instituted between Elizabeth and Foster, but they were afterwards abandoned. Foster died in 1873, and then Beverlin and Elizabeth entered in a new agreement to thereafter live as husband and wife, the impediment having been removed by death. They talked over the advisability of being again married by ceremony, but for prudential reasons preferred to stand upon their new bona fide verbal contract. In 1884 Elizabeth sued Beverlin for divorce, and the trial court issued a divorce decree. The case was appealed, and the supreme court rendered a decision in the matter, holding that the attempted marriage in June, 1861, was void, and that the common-law marriage entered into after the death of Foster was not valid. The court went thoroughly into the matter, discussed the statute at length, and said:

We think our statute has wholly superseded the common law, and its effect, if not in express terms, renders invalid all attempted marriages contracted in the State which have not been solemnized in substantial compliance with its provision.

After devoting some space to an argument tending to show that the statute did contain words of nullity regarding common-law marriages, the court further said:

No marriage or attempted marriage, if it took place in the State, can be held valid here, unless it has been shown to have been solemnized according to our statutes. It is very certain that no attempted or pretended marriage can be held to be valid when it affirmatively appears that it has not been so solemnized.

A most careful examination of all the West Virginia Reports fails to disclose any contrary doctrine; but, on the contrary, the supreme court in the *Hitchcock* case (2 W. Va., 435) intimates strongly that the court, under the statutes, must not recognize the validity of a common-law marriage consummated anywhere in this country, unless it was shown, by the statutes of that State in which it arose, or by the rulings of the supreme court of such State, that such marriage was considered lawful in that State.

These cases effectually settle the status of claimant. She was not lawfully married to soldier by the ceremony of July 12, 1865, and she could not, under the statute, be the lawful wife of soldier unless a ceremonial marriage took place after the impediment had been removed by the divorce in October, 1865.

The Department under the act of August 7, 1882, must be governed by the *lex loci*, and in so doing it must sustain the action appealed from.

Action affirmed.

COMMENCEMENT—ACT OF APRIL 23, 1900—ACT OF JANUARY 5, 1893—MEXICAN WAR.

DANIEL EVELAND.

The act of April 23, 1900, in extending all of the benefits of the act of January 5, 1893, to pensionable Mexican war survivors who are entitled to a service pension, carries with it the benefit of having the pension commence from the same date as those under the last-mentioned act; and the rule for such date is found in the opinion in the case of Robert Markwood (11 P. D., 380).

Assistant Secretary M. W. Miller to the Commissioner of Pensions, July 29, 1903.

Daniel Eveland, formerly a private in Company I, Seventh United States Infantry, Mexican war, being a pensioner at the rate of \$8 per month under the act of January 29, 1887, filed his declaration for increase under the act of April 23, 1900, increase being denied June 25, 1903, in the following terms:

Claimant was not entitled to increase under the act of January 5, 1893, prior to April 23, 1900, the date of the approval of an act extending the provisions and benefits of the act of January 5, 1893, to all survivors of the Mexican war pensionable under existing Mexican war service pension laws. Claimant's name was not on the rolls as a pensioner under act of January 29, 1887, at the date of the passage of the act of January 5, 1893. Act of April 23, 1900, held not to be retroactive in its operation. (See par. 12, subdivision C, Commissioner's Order, No. 92.)

An appeal was filed December 31, 1902, the contention being that error of law was committed in not properly construing the terms of the act in question.

The act of April 23, 1900, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the benefits of the act entitled "An act granting increase of pensions to soldiers of the Mexican war in certain cases," approved January fifth, eighteen hundred and ninety-three, be, and they are hereby, extended to all survivors of the Mexican war who are pensionable under existing Mexican war service pension laws, and who have become or may hereafter become wholly disabled from manual labor and in such destitute circumstances that eight dollars per month are insufficient to provide them the necessities of life, irrespective of the date of the granting of the said service pension.

The act of January 5, 1893, referred to in the last-quoted act is as follows:

That the Secretary of the Interior be, and he is hereby, authorized to increase the pension of every pensioner who is now on the roll at eight dollars per month on account of services in the Mexican war and who is wholly disabled for manual labor, and is in such destitute circumstances that eight dollars per month are insufficient to provide him the necessaries of life, to twelve dollars per month.

The sole issue under this appeal is as to the date of commencement of increase of pension when one claims under the act of April 23, 1900.

The act of January 5, 1893, was merely one of increase, limited in its benefits to those Mexican war survivors whose names were on the roll at the date of its passage. The act of April 23, 1900, left this legislation intact, saving only it took away such limitation, extending its benefits, and all its benefits, to pensionable Mexican war survivors, regardless of the fact that their names were not on the pension roll on January 5, 1893. The act of April 23, 1900, contains no words of grant, mentions no express rate, and makes no provision for filing a declaration; but, in clear, unambiguous, and express terms, affects the act of January 5, 1893, only to the extent of removing the provision as to names being on the roll on January 5, 1893, bestowing its full benefits upon those who show themselves to be within the requisite pensionable condition, physical and financial.

Inasmuch as the act of January 5, 1893, makes no provision for filing a declaration and contains no words of grant, it being simply one of increase, it became necessary for the Department to construe said act, which it did in the opinion in the case of Robert Markwood (11 P. D., 380). The issue in the Markwood case was as to the date of commencement of pension under the act therein discussed, and as portions of the discussion in the said opinion are pertinent to the issue in the case now under consideration, excerpts from said opinion are herein set forth:

The act of January 5, 1893, is in no sense a "special act," as that term is used and known in pension legislation, but is a component part and parcel of the general legislation by Congress pertaining to and granting service pensions to survivors of the Mexican war, and is to be construed in *pari materia* with and in the light of the pension laws governing the grant of such pensions to that class of soldiers.

It is to be observed that the terms of the act are silent as to the date when the increase of pension therein provided shall commence, but this fact becomes of little importance, if not wholly immaterial, when it is taken into consideration that the act itself is but an addendum, so to speak, to the act of January 29, 1887.

It is one of the best-settled and most familiar rules of interpretation and construction of statutes that all laws which relate to the same subject-matter, having in view but one object relative to a certain designated and defined class of individuals, although such laws may have been enacted at different times and under different and diverse circumstances and separated even by long intervals of time, are in *pari materia* and to be considered and construed together as though they constituted but one act. A long line of authorities is cited in support of this proposition by Mr. Sutherland in his work on Statutory Construction, and the soundness of the principle does not admit of doubt. (Sutherland on Statutory Constructions, sec. 283, 288.)

No act has any force until its passage; but, nevertheless, the provisions of an act may be such as to bestow a right upon those included within it, which right may antedate in point of time, so far as emoluments go, the date of the passage of the act. Because this is true the act is not necessarily retroactive, although it may be, as the courts have said in reference to similar statutes, retrospective in its aspect as to certain features. A Mexican war survivor might have been, on January 5, 1893, wholly incapacitated for performing manual labor, and in such destitute circumstances that \$8 per month were not sufficient for the actual necessities of life; and yet, if his name was not on the pension roll on said last-mentioned date he could not, under this act, claim \$12 per month, solely and only because his name was not on the roll, the act granting the increase to those whose names were on the roll and to no others.

It was said in the Markwood case:

As a general rule the pension laws prescribe a definite date for the commencement of pension, which is, in most instances, the date of filing the application; but such commencement is always subservient to the fact that the claimant shall have established by proof that at the date of the filing his case met and fulfilled all the conditions of pensionable title under the law, the real question to be decided in all cases being, At what date was the claimant shown to come within the terms of the statute? Recitals in statutes, however, that pensions shall commence at the date of the filing of the application are terms of limitation; and this Department has no right or authority to introduce such limitation into an act by construction, unless the terms of the act, either expressed or implied, warrant such a procedure.

And that which is true as to want of authority to read a date of commencement into the act of January 5, 1893, as that of the date of filing the declaration, is true as to the lack of authority to make the date of the passage of the act of April 23, 1900, the date of commencement. The last act contains no warrant for such procedure. It does not either expressly or impliedly declare that a pension under its provisions shall commence from the filing of the declaration, or from the date of its passage; but it does, in express terms, refer to the act of January 5, 1893, for the proper date. It is true that no one could claim the benefits of the act of April 23, 1900, prior to the date of its passage; but after said date one certainly could claim all of its benefits, even though among such benefits was the right to receive a certain sum of money covering a period antedating the passage of the act.

If a Mexican war survivor's name was on the roll at \$8 per month and he showed himself to be in such a condition as the act of January 5, 1893, requires, there can not be any question but that he was entitled to \$12 per month from the date of the passage of the last act mentioned. All the act of April 23, 1900, professed or pretended to do was to say to the pensionable Mexican war survivor whose name was not on the roll that notwithstanding such fact he should stand on the same footing and be entitled to all the same benefits as those whose names were

on the roll. It merely took away the condition precedent of his name being on the roll, and allowed him to stand in the shoes of one who was actually drawing a pension under the act of January 29, 1887.

And so the question resolves itself, so far as the present issue is concerned, into a matter of proof. When was the claimant in such a physical and financial condition as is required by the act of January 5, 1893—for such condition is the same, identically, as that set forth in the act of April 23, 1900; if on January 5, 1893, then he is entitled to \$12 per month from that date, for the necessity of the name being on the roll is done away with by the act of April 23, 1900; if not until a subsequent date, then his pension should commence from such a subsequent date. The act of April 23, 1900, makes no change, neither does it imply any change in the date of commencement under the act of January 5, 1893, but it does, as hereinbefore stated, in express terms, make the date the same as that prescribed under the last-mentioned act. The absence of any grant, rate, or date in the act of April 23, 1900, makes it imperative that the act to which it is an addendum must speak as to such particulars.

The act of April 23, 1900, means nothing more nor less than this: That from and after said date, in the claim of a pensionable Mexican war survivor, the fact that his name was not on the roll on January 5, 1893, shall not be taken into consideration so far as the rate to which he was entitled is concerned; and such fact shall not bar his right to \$12 per month under the act of January 5, 1893, provided he is shown to be in such destitute circumstances that \$8 per month is not sufficient to provide him with the necessities of life, and that he is wholly disabled from manual labor; and that the date of commencement of such rate shall be the same date of commencement as that under the act of January 5, 1893. Such date, and the rule for determining it, has already been settled by the Department in the Markwood case, and that rule should govern in claims wherein a pensionable Mexican war survivor invokes the act of April 23, 1900.

Action reversed.

MARRIAGE AND DIVORCE—DIVISION OF PENSION—ACT MARCH 3, 1899.

WILLIE v. WILSON, ALIAS WILLIE.

The evidence in this case fairly shows that claimant was married to pensioner in Cook County, Ill., May 31, 1888; that he deserted her in 1896, and that she is a woman of good moral character and in necessitous circumstances.

Pensioner contends that his marriage to claimant was illegal because he had previously married one Venelia C. Hart, from whom he was never divorced on his application, although admitting that he did not know whether she had obtained a divorce or was alive at the date of his marriage to and separation from claimant.

The law presumes in favor of innocence in support of a duly established marriage, and the party attacking the validity of such a marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage, must not only prove a valid prior marriage, but also prove that it had not been dissolved at the time of the second marriage, even though it involves the proving of a negative.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 29, 1903.*

David Wilson, alias Frank Willie, appealed June 2, 1903, from the Bureau action of May 21, 1903, allowing the claim of Minnie C. Willie, filed September 28, 1901, for one-half his pension on the ground that he had deserted her, she being his lawful wife, a person of good moral character and in necessitous circumstances.

Pensioner, in his said appeal, contends that claimant has not substantiated her claim as being the legal wife; that she has not proved that he willfully deserted her, or that he is not willing and ready at all times to do his best to support her.

Pensioner's main contention before the Bureau was that claimant was not his legal wife; that he had been previously married to one Venelia C. Hart and had never applied for or procured a divorce from her. He admitted, however, that he was married to claimant under the name of Frank Willie for the purpose of concealing his identity from the father of his former wife. He also admitted that he did not know whether his former wife had obtained a divorce or was alive at the date of his marriage to claimant.

Claimant has filed her marriage certificate showing her marriage to pensioner May 31, 1888, in Cook County, Ill, and has also made proof that he deserted her in September, 1896, since which time he has not cohabited with or supported her. The evidence also shows that she is a woman of good moral character and in necessitous circumstances.

The evidence filed by pensioner fails to disprove the validity or legality of his marriage to claimant. The fact that he was married to Venelia C. Hart in 1866 is not sufficient to overcome or outweigh the validity of his subsequent marriage to claimant.

The law presumes in favor of innocence in support of a duly established marriage, and the party attacking the validity of such marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage, must not only prove a *valid* prior marriage, but must also prove that such prior marriage had not been dissolved in any manner at the time of the second marriage, even though it involves the proving of a negative. This is a general and well-recognized rule of evidence. Every presumption is in favor of the validity of the established marriage, and these presumptions must all be overcome by satisfactory, irrefragable proof, the burden of proof being upon the party attacking

the marriage. *Forbin v. Forbin* (13 P. D., 120); *Sharkey v. Sharkey* (ibid., 297); *Isabel W. Siler* (10 P. D., 1); *Jennette Burton* (9 P. D., 31); *Annie Dennis* (ibid., 243).

This is an Illinois marriage, and the rule of evidence above referred to is well recognized by the courts of Illinois. See *Coal Run Company v. Jones* (127 Ill., 379); *Harris v. Harris* (8 Brad., App. Rep., 57); *Johnson v. Johnson* (114 Ill., 611); *Cole v. Cole* (153 Ill., 585); *Schmisser v. Beatrice* (147 Ill., 210).

The evidence fails to show any bona fide attempt on the part of pensioner to renew the suspended matrimonial relation with claimant such as would relieve him from the charge of desertion.

The Bureau action appealed from was strictly in accordance with the law and the evidence and is accordingly affirmed.

DIVISION OF PENSION—ACT MARCH 3, 1899—DESERTION.

LOCKARD v. LOCKARD.

Where the husband, by his cruelty and abuse, drives his wife from the matrimonial home it may be presumed that he intended to effect a separation by his own wrongful and illegal acts. The one who intentionally drives the other away is the deserter. *Rothery v. Rothery* (11 P. D., 77-377); *Barnett v. Barnett* (27 Ind. App., 471).

Assistant Secretary M. W. Miller to the Commissioner of Pensions.

Benton Lockard, a pensioner under certificate No. 573694, at \$17 per month, appealed May 12, 1903, from the Bureau action of April 11, 1903, allowing the claim of his wife, Elsie, filed August 6, 1902, for one-half his pension, the Bureau holding that—

Pensioner deserted claimant, his lawful wife, who is a person of good moral character and in necessitous circumstances.

Pensioner, in his said appeal, contends that—

The Commissioner of Pensions erred in not allowing the testimony filed herein by appellant to seem to have any influence at all. Testimony was filed by appellant showing that one-half the rental value of the property occupied by said Elsie Lockard, owned by appellant and appellee, was worth a rental of \$2.50 per month. He also filed the testimony of George S. Cobb, township trustee, ex-officio overseer to the poor, to whom appellant gave money for appellee, and with whom appellant left groceries for appellee, and she, said appellee, refused to receive anything from appellant directly or indirectly. That appellee had applied to said trustee for aid.

See also the affidavit of John W. Cornell, groceryman; also the affidavit of Orange B. Lockard, Benton Lockard, and Mrs. Jennie Redecker, all showing that the reason she received no support from appellant was her utter refusal to allow him in any way to support her. Take notice that none of this support offered to her was conditioned on her living with appellant. All the testimony above referred to is on file with the honorable Commissioner of Pensions.

These facts considered appellant was surprised that the Commissioner of Pensions should come to the decision that appellant had not done all that could be done to support appellee. He certainly could not compel her to receive the support offered.

Appellant therefore asks that the decision of the Commissioner of Pensions, granting to appellee Elsie Lockard the one-half of his pension be reversed, and that her application for such division be denied, and for all other proper relief.

Claimant in her answer, brief, and argument contends as follows:

In his appeal appellant does not controvert nor deny any of the allegations of appellee's original declaration and supplementary affidavit, and evidence filed in support thereof. Therefore appellant admits, for this case, that the facts alleged by appellee are true.

Appellant seeks to reverse the Bureau action by alleging "that the Commissioner of Pensions erred in not allowing the testimony filed herein by appellant to seem to have any influence at all," specifying the testimony referred to. Appellant points out no error of law or of fact in the decision of the Commissioner of Pensions, as required by rule 19; but if appellant's statement does point out any error at all it must be an error of law. A perusal of the evidence specified in appellant's appeal will disclose that appellant seeks to cure and excuse a brutal, vicious course of cruel treatment of appellee, extending over more than thirty years (as shown by testimony and court records filed by appellee in the Bureau of Pensions), by evidence showing that after the separation of appellant and appellee, the appellant had offered appellee some money and a few groceries through the agency of George S. Cobb, the township trustee and overseer of the poor. All the evidence submitted by appellant, upon which he seeks reversal, *relates and refers* to a period *after* the alleged separation. The evidence shows that what appellant did then was to offer appellee, through the trustee, a few dollars and some groceries. Nowhere has he shown such a bona fide offer of reconciliation as would put appellee in the wrong.

"Appellee was not required to accept any offer of support from appellant after a separation because of his cruelty." See Am. and Eng. Ency. of Law (2d ed.), vol. 9, p. 773; *Sargent v. Sargent* (36 N. J. Eq., 644); *Smith v. Smith* (55 N. J. Eq., 222).

"Moreover appellee was not bound to receive support of any kind from her husband through the overseer of the poor, Mr. Cobb, or other strangers." See *Fishli v. Fishli* (2 Litt. (Ky.), 337).

Appellant in his appeal further shows that said support was not an offer of reconciliation and return to marital relations, but all the evidence shows that the offer of support was a mere subterfuge and trick on the part of appellant to defeat appellee's claim for one-half his pension. Appellant says in his appeal "Take notice that none of this support offered to her was conditioned on her living with appellant." Is not a wife entitled to something more than mere support from her husband?

"The offer of reconciliation must be made in good faith and for the purpose of effecting a reconciliation." Am. & Eng. Ency. of Law (2d ed.), Vol. 9, p. 773. See notes and cases cited.

"The wife is justified in refusing a mere offer of support in the husband's house, as she may require a reconciliation and reunion." *Fishli v. Fishli*, 2 Litt. (Ky.) 237; *Briggs v. Briggs* (24 S. Car., 377).

A full review of the evidence submitted by the appellee will convince beyond all doubt that appellee was and is justified in her fear and mistrust of appellant, and that she is entitled to the relief demanded. It is undisputed that appellant was convicted and served a term in the penitentiary for the awful crime of incest on appellee's youngest daughter (see transcript of the case of the State of Indiana *v. Benton Lockard*, Elkhart circuit court); that after serving that sentence he soon committed the terrible crime of malicious mayhem on Mrs. Levi Lockard by viciously destroying her left eye (see affidavits of Henry Lehman and Mary Furlong); that he used liquor to excess and is a man of vicious temper (see affidavits of Mary Furlong, Elsie Lockard, Clarence Lockard, Daniel Shively, and Henry Kurts); that he constantly treated appellee in a grossly cruel and inhuman manner (see affidavits of Inez Anderson,

Mrs. Daniel Anderson, Clarence Lockard, court transcript, etc.); that shortly before appellee was driven from their temporary home at Orange, Lockard's, he, the appellant, *pleaded guilty* to a criminal charge of assault and battery on appellee, his wife, who was at that time 72 years of age (see transcript of the case of the State of Indiana v. Benton Lockard, Elkhart city court).

Appellant has not denied these facts, all of which show that appellee endured to the limit before she submitted to a separation. Appellant violated every marriage vow and every duty to his wife from him as her husband. No woman would accept support from such a brute.

If appellant's specifications of error be construed as denying the desertion, in fact or in law, again the appellant must fail.

"Desertion, as applied to marriage, signifies a willful termination of the marital relation." Am. and Eng. Ency. of Law (2d ed.), vol. 9, p. 768.

The evidence shows that appellant, after years of cruelty inflicted by him on appellee, broke up the home in Goshen, moved to Elkhart with appellee, broke up the home there, lived with a son for several months, then violently and in great anger and passion drove appellee from that temporary home at their son's house, after which appellee returned to their homestead in Goshen, Ind.

"If the husband drive the wife from home by his cruelty, this, besides being the statutory cause of inhuman and cruel treatment will constitute desertion on his part. Where the cruelty of the husband is carried to the extent that the wife is compelled thereby to depart, it may be presumed that he intended such effect to his cruelty." *Barnett v. Barnett* (27 Ind. App., 471). See also 20 Ala., 168; 4 Bush. Ky., 682; 37 Pa., 443; 22 Md., 337.

The cruelty shown by the evidence in this case would be ground for divorce by appellee. *Shores v. Shores* (23 Ind., 546); *Mercer v. Mercer* (114 Ind., 558).

Therefore, there was no error in the decision of the honorable Commissioner of Pensions that "pensioner deserted claimant, his lawful wife." The other elements of the decision, namely, "who is a person of good moral character and in necessitous circumstances," have been proven beyond dispute, and are not controverted by appellant.

Wherefore appellee, Elsie Lockard, prays that the decision of the Pension Bureau be affirmed in all things and that a certificate be issued to appellee, and payment be made to her of one-half the pension of her said husband without further delay.

The appeal in this case was considered in part May 28, 1903, and while the assignments of error were not as clear, specific, and definite as good practice would require, yet they were deemed a sufficient compliance with Rule 19 to justify consideration by the Department, but in view of the conflicting and unsatisfactory character of the testimony in the case, the papers were returned to the Bureau for a special examination, readjudication of the claim, and a report thereon.

The papers were returned to this Department with a report of the Bureau June 29, 1903, in compliance with the departmental order of May 28, 1903, showing that the Bureau, after considering the testimony taken on special examination, adhered to its former action in its readjudication of June 29, 1903.

The appeal will now be considered on its merits. The evidence shows that claimant, when a widow, aged 38 years, with three daughters by her first husband, was married to pensioner, aged 30 years, in the State of Indiana, June 29, 1867; that on April 1, 1871, pensioner

was convicted of incest with claimant's youngest daughter (since deceased), and sentenced to the penitentiary for three years; that while serving his said sentence claimant procured a divorce from him April 29, 1873, and remarried him January 30, 1874, since which time the parties have lived and cohabited as husband and wife in Michigan and at Goshen and Elkhart, Ind., at which latter place they separated December 30, 1901, claimant leaving the matrimonial home and returning with her household goods to their former home in Goshen, where she has continued to reside with her young grandson, aged about 13 years, and refused to cohabit with pensioner, or to permit him to occupy the said residence with her, or any portion thereof. Both parties have a joint life leasehold estate in the Goshen home, where claimant resides, the property being valued at about \$500. This property and a small amount of household goods of nominal value is the only property and source of income possessed by either party aside from said pension of \$17 per month.

Claimant, while about 74 years of age, is shown to be stronger physically than pensioner, who, although but about 66 years of age, is disabled by disease of stomach and liver, of service origin, for which he is pensioned. He is also disabled to some extent by double rupture of comparatively recent origin. The evidence, however, tends to show that he is not wholly incapacitated for earning his living by manual labor, and his physical condition on November 28, 1901, preceding said separation, enabled him to vanquish, in a physical conflict, his wife and two granddaughters, aged 17 and 20 years respectively, according to his own version and the records of the police court.

As pensioner and several witnesses attribute this quarrel as the cause of the final separation, which culminated about a month later, their testimony, as well as that of claimant and her witnesses, may be properly referred to at length.

Pensioner testified before the special examiner, June 19, 1903, in reference to this event, which took place while they were living with their eldest son, at Elkhart, Ind., as follows:

The last trouble between us originated in our house when Inez and Daisy Anderson, our grandchildren, came to Thanksgiving dinner. I looked for trouble before they came. They set about to break up my home; found fault with me and charged me with abusing her (claimant). I told them if they couldn't behave to leave my house; they said they wouldn't. I laid their wraps outdoors and told them to follow. Wife followed me to the door and said, "Ben, you don't put those things out there." The three women jumped on to me, tore my collar off and tore my shirt, and struck me in the face, and in self-defense I pushed them away, but never did I strike one of them.

I had the girls arrested for assault, and they paid a fine of \$10 each. The girls then had me arrested for assaulting my wife, and I was fined \$10. I pushed my wife back, and nothing more. That led up to our final separation. and we have not lived together since that—December 30, 1901. She became cross and very irritable,

and would not go to bed to sleep, or cook meals for me, saying she would no longer live with me, calling me vile names. December 30, 1901, she loaded all our household goods in a wagon and started for Goshen, I giving her potatoes, twenty-five pounds of flour, and \$2 in money, begging that I might go too, but to no avail. I have since then written kind letters to her, enough to break the heart of a stone, to let me come back, but she wouldn't listen, but returned my letters. I stand ready and willing now, and have been anxious to live with her and do for her. She has reported things in general, so as to injure my name and character. * * * I remained in Elkhart with my son, Orange, six weeks, and had him go to his mother and get her reconciled to our reunion again, but she would not listen or accept a thing from me. I heard she was getting aid from the poor fund in Goshen and went to Mr. Cobb and asked him if that was so, and told him I came to give her that support and to relieve him further. We went together to the house to see her. I offered her my hand, which she refused. Cobb told her that if I could have room even to sleep in, and not live as man and wife, I would take any place, even the woodshed, and she refused me entrance, and said she hated me and never wanted to see my face, dead or alive. I have tried to see her since then, but she would not admit me. I asked her to hoist the window, as I wanted to drop her a dollar, and she told me and my money to go to hell. I left provisions and money with Cobb, and would do so weekly, but she refused to accept. She has since frequently passed me by on the streets, ignoring me totally, which almost broke my heart.

Orange B. Lockard, the eldest son of claimant and pensioner, aged 36 years, testified before the special examiner at Elkhart, Ind., June 19, 1903, in reference to said Thanksgiving Day altercation, as follows:

I hardly know what did lead up to that quarrel. I was present. Father turned our half-sisters, Inez and Daisy Anderson, out of the house on Thanksgiving day, as they had come on a visit. They said they wouldn't go. I don't know what it was about. He then threw their duds out of the house. The girls and mother came to rescue and the girls pitched on to father and tore his necktie off. I don't know as mother did anything. I was in another room; words were used, but I don't remember what was said.

He further testified that both his parents cursed each other and called each other vile names, but that he had never seen either strike the other.

Daisy M. Anderson, aged 19 years, testified before the examiner June 22, 1903, that she is the granddaughter of the claimant and pensioner, that she was at her grandparents' in Elkhart, at Thanksgiving dinner, November 28, 1901; that her sister, Inez, aged 22 years, their mother, and their aunt, Mrs. Cliff Booker, of Menominee, Mich., were at dinner, and Mrs. Booker told her grandfather to "be good to grandma;" that that made him mad, and he replied that "Anyone who said he was not good to her was a d— d— liar;" that about 4 o'clock in the afternoon, after her mother had gone, pensioner commenced to curse and swear at her, and called her grandmother a d— fool and other names, whereupon she, deponent, "had something to say" and upbraided him for talking so to his wife.

Witness further testified as follows:

I think he was partly intoxicated, though I did not smell his breath, nor was I near enough. He had no provocation. He said he intended to put me out, and

said, "No, you won't." He threw sister's waterproof in the yard, and as she went into the kitchen he followed, striking her on her arm. I then flew at him and he turned, striking me, knocking me across two chairs, striking my head on a sewing machine. I grabbed his necktie. He struck me with his fist on my head a severe blow, and I fell over. Grandma stood back. Sister Inez stepped in between us. He had us two girls arrested and we paid our fine. That was the only time I ever saw him strike grandma, when I pitched into him, I saw his right hand fly out and strike her. She staggered back and said, "Don't do that; be good." What his reply was I don't remember. We all went to the police station for trial and sister and I came direct to South Bend. I have not seen them since. Their separation soon followed, but as to the facts leading up to it any farther I have no personal knowledge.

David J. Lockard, aged 34 years, testified before the examiner, June 18, 1903, that he is the youngest son of claimant and pensioner; that his father had been a drinking man, rough in the use of language, and abusive of his mother ever since he remembered and until their separation; that he had seen his father, when drunk, time and again, strike his mother with his fist and otherwise abuse her; that he had seen him knock her over more than once; that he had heard him threaten to shoot her, calling her vile names; that his father's reputation is bad; that since their separation he had threatened to take his mother to the county house and had written deponent to that effect, but deponent would not permit it; that he was not present at the time of their final separation and knew nothing personally in reference to the quarrel preceding the separation.

Clarence M. Lockard, a grandson of claimant and pensioner, aged 13 years, testified before the examiner, June 10, 1902, that he had lived with claimant, his grandmother, ever since he could remember, that his grandmother would not allow his grandfather to live with her because he got drunk and abused her. He further testified as follows:

One Saturday, not long before they parted, he went uptown and bought a gun and brought it home under his overcoat; that he went into the wood shed and loaded it with cartridges; he was then drunk. Grandmother wanted him to give up the gun, and when he came into the house he called her vile names, and threatened to shoot her; that he did not point the gun at her, but struck her in the face with his full fist, cursing and swearing at her; that one day, just before moving to Elkhart, he swore at her and threatened to kill her. She stood in fear of her life. * * * She simply cried, kept still and didn't say a word; did not fight or throw anything at him. At this time he threw a flatiron at her head, just missed her, striking the wood box, as it now appears dented. * * * He has never received other than kind treatment from grandma.

Mrs. Louisa J. Chamberlain, daughter of claimant by her first husband, age 54 years, testified before the examiner that pensioner had driven her mother out of the house many times, with a knife in his hand, ordering her never to return; that she had seen marks on her mother's limbs and shoulders where he had kicked and struck her; that her mother was always afraid of him and submitted to his abuse; that she had never heard her mother abuse pensioner or call him

names, but that he would call her vile names, sing lewd songs to annoy her, and then when a stranger came to the house he would ask a blessing at the table; that he would "act the preacher as well as anyone."

Frank J. Hattel, aged 59 years, a cousin of pensioner, testified before the examiner that he had known pensioner from boyhood, and that he regarded him as "one of the most treacherous men on earth;" that he used to be a drinking man, but not of late years; that pensioner had spent his money on and kept company with a woman of bad reputation; that he had seen them together and the woman had stated to him that she had "got a fellow," meaning pensioner.

Dr. Albert J. Irwin, secretary of the board of examining surgeons of Goshen, Ind., testified before the examiner that he had been the family physician of claimant and pensioner and had known them in a professional way for the last ten years, and had gained some information as to their family in a general way; that claimant is a good old woman, and that he knew nothing against her character in any sense; that she had called at his office many times solicitous as to his physical well being and welfare; nursed, fed, and cared for him when he pretended to be so disabled that he could not get out of bed, and that deponent had to go and see him. He further testified as follows:

I call him a first-class deceiver and deadbeat, and a frequenter of the saloon near my office. I have been very much deceived in the man, and he has completely played the case of a deadbeat. I think him an old liar, absolutely unreliable. My sympathies are altogether with the claimant. I know that she has done for him and worked over him when he would be lying around the house, and when I thought him perfectly able to do and care for himself. * * * I now wish to add that I withdraw all pension recommendation made by me as secretary of the board. He laid around the house for three years doing no work, leaving it for the old wife to look after the needs of the two.

Rev. William Hess testified before the examiner that claimant is a member of his church, in good standing, and that pensioner's reputation is bad; that he lies, frequents saloons, is indolent, quick tempered, and apt to "fly off his base;" that the church has furnished them aid five or six years, and up to about eighteen months prior to June, 1903, during all which time pensioner was in receipt of a pension of \$17 per month, but failed to support his wife; that she bears a good reputation, is in need, and, owing to her age, is physically unable to do actual labor to earn her livelihood.

Claimant testified before the special examiner June 18, 1903, that she was 74 years of age, and had always lived in Elkhart County, Ind., except during four years when they lived in Briggsville, Mich. She further testified as follows:

I lived with him as his wife until a year ago last December, a Monday after Christmas, two years ago; I have not lived with him as his wife since that time. I have not wanted to live with him nor have I made any offer to have him come home, because he has treated me badly, abused me, and done everything he could to injure

me. He will steal and drink. He has knocked me down, calling me vile names, and a short time before going to Elkhart pushed me down, threw a flatiron at my head, barely missing me, and while holding a gun in his hand said if it were not for the law he would shoot me. Then we moved to Elkhart and lived there for six months. I moved there and he followed me. I made my home with my son Orange. On Thanksgiving day two years ago our small family was present, and he was present and took dinner with us, and after dinner some of the children remained. Daisy Anderson, my granddaughter, remained, when Lockard ordered her out of the house. He shut me out of the house and as I went to go in gave me a punch in the face with his fist, knocking me back against the wall. He has struck me many a time. We lived together there up to Christmas, the Monday following, and during that time he abused me, calling me vile names, jumping up and down, clenching his fists, telling me to go to hell. I went without food for several days. This was in 1901, that cold winter. I then went to the Elkhart town trustee and asked for help or to go to the county house. Monday I was brought back to Goshen. Lockard had disappeared and left for parts unknown. I quit him in Elkhart and our things were there. I came back here and have not lived with him since. He certainly deserted me at the house in Elkhart and left me destitute; didn't have a thing to eat and my son came to my rescue. Lockard deserted me in Elkhart; I did not desert him. He left me on a Sunday p. m. following Christmas of 1901. Yes; I made an attempt to obtain a divorce from him after that time, but did not push it for obvious reasons. He has not lived with me or been in this house since I refused to live with him. I have refused to live with him but he has wanted to come back to live here. He has threatened me in every way he could. The more I would talk the more he would talk. While living in Elkhart he would go to see women of ill repute in a house of ill fame there in the winter of 1901. A woman here in town slapped his face and another one horsewhipped him for insults.

He has offered to give me something in two small packages, left at the room of the trustees, but I refused to accept them because I was afraid they contained poison, for he had so often threatened me. He attempted to poison himself with aconite at Elkhart in 1901. He was not crazy.

Several other witnesses have testified to pensioner's treatment of his wife, his immoral and untruthful character.

Referring now to the testimony of the witnesses named by appellant, which he contends was not given due weight by the Bureau, it appears that Mr. Cobb testified before the examiner that as trustee he had given claimant relief in 1901, wood and groceries, but no money; that he subsequently went to visit her when he first learned she had a husband; that they gave her aid until last winter, 1902, when some one called his attention to the fact that her husband drew a good pension, and had offered to support her; that pensioner left a dollar to be handed to his wife and a few groceries which she refused to accept; that pensioner continued to leave \$1.25 each week for her keeping; that he accompanied pensioner to the house where claimant resided but she refused to shake hands with pensioner; that pensioner offered to give her provisions and to aid her if allowed to sleep in the house and have a room; that she claimed he abused her, but nothing more was said.

Mr. Cornell testified before the examiner, June 18, 1903, that he was the commander of a G. A. R. post at Goshen, Ind., and had known

pensioner for the past eight years; that his reputation for truth and veracity, sobriety, and morality are good; that he never saw him frequent a saloon; had not known him to have a quarrelsome disposition, but that he had seen him only on the streets and in the lodge room, but not in his family; that he had no personal acquaintance with claimant; had never heard anything derogatory to her character; that she had received town orders and traded them off at deponent's store, off and on, for three or four years before their separation, and since; that when he spoke to claimant about living with her husband she replied that she would "rot in the street" before she would again live with him, but she gave no reason; that he had visited them at their home in the winter of 1892, when pensioner was sick, when they appeared to live well together; that pensioner always stood ready and willing to support his wife; that he would say "he had a serpent in his breast to uncoil."

Mrs. Jennie M. Redecker, who was not examined by the special examiner, testified in an ex parte affidavit, December 17, 1902, that prior to their removal to Elkhart, in the latter part of 1901, claimant and pensioner had lived near her in Goshen, and that she had frequently seen pensioner carrying groceries and provisions to his home, and knew that they were well supplied with wood for fuel; that in a conversation with claimant, in June, 1902, she heard her say, "I would rather have a crust of bread by myself than live with him;" that she further said that she did not want anything to do with him; that if he would come on the place she would run him off; that one old lady said to claimant in affiant's presence, "He would help you, wouldn't he?" She replied, "Oh, yes; but I wouldn't accept it."

The testimony of pensioner and his son Orange B. Lockard has already been cited.

Claimant does not deny that she has refused aid from pensioner since their final separation or that she has refused to live with him.

The first question presented for determination by the Department is, Was claimant legally justified in leaving her husband and the matrimonial home and refusing his subsequent offers of reconciliation and support? That she has suffered much injury, cruelty, and abuse from him can not, in view of the foregoing testimony, be reasonably denied. That she should have condoned the offense for which he was sent to the penitentiary, and after procuring a divorce from him have remarried him indicates either strong confidence and affection or a moral degeneracy on the level with the beast. Whatever may have been the motive which induced her to again resume marital relations with a brutal, immoral, ex-prison convict he is not relieved or in any manner excused for his subsequent brutal treatment of his wife. That he was guilty of such cruelty as would justify a divorce upon that ground alone is fairly established by a preponderance of the evidence

in the case. If his conduct was such as to cause his wife to believe her life, health, or person to be in jeopardy, without fault or sufficient provocation on her part, she was legally justified in her separation from him and her refusal to longer cohabit with him.

As stated by Richardson, C. J., in the case of *Poor v. Poor* (8 N. H., 307), 29 Am. Dec. 664-670:

In the judgment of the law, any willful misconduct of the husband, which endangers the life or the health of the wife; which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty. And in order to amount to such cruelty it is not necessary that there should be many acts. Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered as safe. Citing 2 Kent Com., 126; *Smith v. Smith*, 1 Eng. Ecc., 232; *French v. French* (4 Mass., 588); 2 Paige, 502 (7 N. H., 196); *Hulme v. Hulme* (2 Eng. Ecc., 208).

And at this day the moral sense of the community revolts at the idea that a husband may inflict personal chastisement, even for the most outrageous conduct.

The foregoing decision was rendered in 1836, and it is not believed that the moral sense of the community has degenerated since that time.

The evidence fails to disclose any unwifely or defiant conduct on the part of claimant. She is not shown to have been the aggressor in a single instance. The special examiner reports that—

Claimant bears a good reputation for sobriety and morality among her people. She is an illiterate woman and if her mental faculties are blunted it may be the result of poverty, trouble, and family contentions.

If, as indicated by the testimony of the eldest son, she, when abused by her husband, retorted in kind, it is not to be charged wholly against her. He appears never to have suffered any physical violence at her hands, but, on the contrary, when any domestic difficulties arose he appears to have been the unjustifiable aggressor. His unmanly, cruel, and abusive conduct to his wife is wholly without excuse. For much less cruelty than is shown in this case, she would have been legally justified in leaving her husband and refusing to renew marital relations.

Cruelty may be defined, in general terms, to be any conduct in one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other. *Morris v. Morris* (14 Cal., 76; 73 Am. Dec., 615 and notes); *Mahone v. Mahone* (19 Cal., 626; 81 Am. Dec., 91 and notes); *Southwick v. Southwick* (97 Mass., 327; 93 Am. Dec., 95 and notes); *Cooper v. Cooper* (17 Mich., 502; 97 Am. Dec., 182 and notes.)

In the case under consideration the separation is for cause, and this case is to be distinguished from those cases where the separation is by mutual consent, in which latter class of cases a refusal by either party to renew the suspended matrimonial relation on the bona fide request of the other, constitutes the refusing party the deserter. Where, however, as in this case, the facts legally justify the wife in leaving her

husband and the matrimonial home, she is also legally justified in refusing to renew the suspended marital relation without becoming the deserter. *Warner v. Warner* (54 Mich., 492).

The Department is of the opinion that the preponderance of evidence in this case fairly establishes the fact that claimant was legally justified in leaving her husband and their matrimonial home with the avowed intent never to return or to live with him again by reason of his cruelty and abuse.

Where the husband, by his cruelty and abuse, drives his wife from the matrimonial home, it is to be presumed that he intended to effect a separation by his own wrongful and illegal acts, and this presumption is not outweighed or overcome by his subsequent offers to resume the marital relation with his wife, or by offering her financial support. The one who intentionally drives the other away is the deserter. (*Rothery v. Rothery*, 11 P. D., 77-377; *Martin v. Martin*, 13 P. D., 430; *Barnett v. Barnett*, 27 Ind. App., 471.)

While this appeal was under consideration pensioner, on July 9, 1903, filed in the Bureau the following purported transcript of a decree of divorce, viz:

Pleas and proceedings before the Honorable Joseph D. Farrell, judge of the 34th judicial circuit of the State of Indiana, and ex-officio judge of the Elkhart circuit court, at a regular term of said court begun, held, and continued at the court-house in the city of Goshen, Elkhart County, Indiana, commencing on Monday, May 25, 1903.

BENTON LOCKARD	} Cause No. 10361.
v.	
ELSIE LOCKARD.	

Be it remembered that afterwards, to wit, June 27, 1903, the same being the 30th juridical day of the May term, at the same place and before the same honorable judge aforesaid, occurred the following proceedings in the above-entitled cause, to wit:

BENTON LOCKARD	} Cause No. 10361. Decree of judicial separation.
v.	
ELSIE LOCKARD.	

Come now the parties, plaintiff and defendant, in person and by counsel, and the court having heard the evidence and being well advised in the premises, finds that the plaintiff and defendant were legal residents of Elkhart County and State of Indiana for more than two years immediately preceding the filing of the plaintiff's complaint; the court further finds against the plaintiff upon his complaint and for the defendant that the allegations of her cross-complaint are true; the court further finds that the plaintiff is sixty-seven years of age and that he receives a pension of seventeen dollars per month from the United States; that defendant is seventy-three years of age; that plaintiff and defendant are the joint owners of a life lease in the house and lot known as the north one-half of lot number seven in Hess' Riverside addition to the city of Goshen, Indiana, which premises are of the rental value of four dollars per month; plaintiff and defendant also own a small amount of personal property, but nothing else; that said plaintiff and defendant are unable to live together and should be separated from bed and board for the period of seven years, unless the court makes a different finding and decree before the end of said period of seven years; that defendant is entitled to full possession of said premises during the period

of said separation; that the court recommends that the Bureau of Pensions of the United States adjudge and allow the defendant the sum of five and $\frac{1}{10}$ dollars per month out of the pension of said plaintiff upon the application of said defendant now pending in the said Bureau of Pensions.

It is further considered and adjudged by the court, subject to the further orders and decrees of the court, that the plaintiff and defendant be separated from bed and board, and that they live separate and apart from each other for the period of seven years; that for said period of seven years the defendant have full and complete possession of the north one-half of lot number seven in Hess' Riverside addition to the city of Goshen, Indiana, and that plaintiff leave defendant undisturbed in her enjoyment of the possession of said property during that time.

It is further considered and adjudged by the court that the plaintiff pay the costs herein taxed at dollars.

Rule 19 of Practice provides that—

No additional evidence upon the merits of a claim should be filed by either appellant or appellee, or considered on appeal.

Even if this alleged decree be considered by way of argument, it would amount, at most, to but an admission or consent on the part of the pensioner that claimant be awarded a portion of his pension, as his filing said alleged decree would indicate an assent to the voluntary gratuitous advice or recommendation by the court to the Bureau of Pensions; but neither pensioner's assent nor a decree of the court warrants this Department or the Bureau in varying the terms of an act of Congress. The act of March 3, 1899, grants claimant one-half her husband's pension or it grants her nothing. He is in receipt of \$17 per month. If he has deserted her, if she is his wife, of good moral character and in necessitous circumstances, then, under the law she is entitled to \$8.50 per month so long as she remains his wife and the desertion and necessitous circumstances continue.

A decree of separation or divorce a mensa et thoro does not terminate the marriage status.

Without passing upon the validity of said decree or its future effect upon the rights of the parties, it is sufficient to say that it in no manner impeaches or affects the legality or regularity of the Bureau action appealed from.

Whether under the statutes of Indiana a decree of divorce a mensa et thoro, or the granting of alimony, other than in money is authorized, are questions for the Bureau to consider in determining the right of continuing or terminating future division of the pension.

The only remaining question to be considered is whether claimant is in necessitous circumstances within the meaning of the act of March 3, 1899, and whether her acceptance of pensioner's offer would have relieved her of her necessitous condition.

While claimant is older than pensioner, yet their earning ability appears to be about equal. She is in possession of property worth, according to pensioner's estimate, a rental value of \$5 per month.

Claimant and other witnesses, however, estimate it at but \$4 per

month, and this would appear a fair rental value for property which cost less than \$500. Her yearly income, therefore, from this property would be equivalent to \$48.

Pensioner is in receipt of an annual income of \$204 from his pension. His offer to Mr. Cobb, the overseer of the poor, of \$1.25 per week for her support was but temporary, and there is reason for holding, as contended by claimant, that she should not be required to accept aid through the overseer of the poor. The cash value of her life leasehold estate, in view of her age, is but slight.

In the case of *Dustin v. Dustin* (13 P. D., 77), the pensioner was 61 years of age, not wholly incapacitated for earning his support by manual labor, and was in receipt of an income of \$204 per annum from his pension. His wife was 58 years of age, in poor health, with one minor child dependent upon her for support. She was possessed of real estate assessed at \$300 cash valuation, and personal property valued at about \$50.

The Department, after stating that no absolute rule could be laid down which would be alike applicable to all cases, and after referring to the authorities bearing upon the question of necessitous circumstances, held that she was in necessitous circumstances within the meaning of said act of March 3, 1899, citing departmental decision in the case of *Pierce v. Pierce* (12 P. D., 412). See also *Parker v. Parker* (13 P. D., 233) and *Doherty v. Doherty* (ibid., 302).

In harmony with the foregoing decisions, the Department is of the opinion that the evidence in this case shows that claimant is in necessitous circumstances within the meaning of the act of March 3, 1899.

The action appealed from is accordingly affirmed.

FRAUD AND MISTAKE—REIMBURSEMENT—RESTORATION.

CAMDEN L. HILL.

It appearing from the evidence of the experts that soldier's disease of eyes for which he was pensioned was due to gonorrheal ophthalmia, for which reason his name was dropped from the roll, the rejection of his claim for restoration of pension was proper; but as it does not appear that soldier knew said disease of eyes was due to said cause when he was prosecuting his claim for pension, but had good reason to believe it due to a severe cold, he was not guilty of fraud in obtaining the allowance of said pension, and the action withholding his pension granted under the act of June 27, 1890, to reimburse the Government for the money erroneously paid under the general law was error and is reversed.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 29, 1903.*

Camden L. Hill served as a private in Company G, Twenty-first Indiana Volunteer Infantry, and was discharged July 31, 1864, after three years' service.

He was pensioned under the general law from March 10, 1885, at \$4 for disease of right eye, and at \$8 from October 5, 1893 (certificate No. 339900).

The claimant contended that the disease of his eye resulted from a severe cold from exposure in the army, which settled in his eye.

On May 3, 1901, he was dropped from the pension rolls on the ground that the present disability of the right eye is due to gonorrheal ophthalmia. From this action the claimant appealed, on June 1, 1903, and upon affidavits showing the claimant's necessity and serious disability the case has been made special.

Subsequent to the action of dropping, the claimant filed a claim for pension under the act of June 27, 1890, was allowed at the rate of \$6 from January 27, 1902, for general debility, but payment of the pension was deferred to recover the payments made under the general law claim, on the ground that the disability for which said payments were made was not due to the military service of the soldier, and that he had procured the original pension by fraud.

The claimant was notified of this action by a letter from the Bureau, dated February 18, 1903, and he was given thirty days to make answer and show cause, if any, why this action should not be taken. Reply was made by the claimant, in a letter transmitted through Hon. A. J. Beveridge, United States Senator, in which protest is made that injustice was done him by the specialist who examined him for the Bureau, denial is made that he ever acknowledged that his trouble was the result of gonorrheal ophthalmia, as indicated by the report of the specialist, and repudiation is made of the suggestion that he ever knew or suspected that his disease of the eyes was the result of gonorrhœa and had therefore fraudulently prosecuted a claim and secured a pension for such diseased eye.

By way of appeal the claimant filed a lengthy protest, and denial of any fraud on his part, and against the decision of the Bureau that his disability is the result of gonorrhœa, and insisting that under other examinations by boards of surgeons and by specialists, who were experts, there was no report or finding charging the responsibility of the present disease of the right eye to gonorrhœa, and that only Dr. Thompson who examined him as a specialist presented the theory of gonorrheal ophthalmia, notwithstanding that all of the surgeons who had examined him had asked the same question.

The certificate of examination made by Dr. James L. Thompson, upon which the adverse action was based, was dated July 3, 1898, and was as follows:

Has dense opaque spots on right cornea. Has cicatricial bands through the lower part of the conjunctiva of the right eye, causing incomplete symblepharon, which is proof of a former violent conjunctivitis which he admits was caused by gonorrheal ophthalmia, while in the army. Vision of right eye is little more than simple perception of light, which so confuses the left eye that makes it worse than if the right eye were totally blind.

There are no evidences of syphilis.

The iris dilates fully, so far as can be seen through the opaque cornea. Syphilis gives a different train of results. It was a very plain case of purulent ophthalmia, doubtless of gonorrheal origin.

The records of the War Department do not show any treatment for gonorrhea while in the service, but there is a record of treatment for syphilis from November 3 to December 22, 1863.

In an affidavit made on May 6, 1901, claimant admits that he did acknowledge to Dr. Thompson that he "had clapp in New Orleans and Baltimore, but only for one or two weeks at a time, but was cured up sound and well and had no bad effects from it either in body or eyes."

Under special examination the claimant admitted that he had gonorrhea in the service at New Orleans or at Algiers, before he had the trouble with his eyes, and that he had the disease four or five times during his service. But he insists that the disease of his eyes had no connection with the gonorrhea, but was the result of cold and exposure, and that he had no gonorrhea at the time his eye became sore. He denied that he ever had syphilis at any time.

A mass of testimony has been filed by lay witnesses as to the incurance, existence, and continuance of the disease of the claimant's eyes, but in view of the fact that it is conceded that the claimant did have gonorrhea while in the service, the question of the responsibility of this disease narrows itself down to one of medical authority, and the greater probability as to the origin of the disease, between gonorrhea and catarrhal inflammation.

Under special examination Dr. James L. Thompson, who is rated as an expert specialist, deposed that while not now remembering as to the claimant's statement to him at the time of the examination, admitting that his eye disease was due to gonorrheal ophthalmia, he is satisfied that claimant must have stated as he reported him, and also that with knowledge that the claimant had the gonorrhea in the service, his professional opinion is that the disease of the right eye resulted therefrom.

The claimant filed the affidavits of two physicians after the notice given that his pension would be dropped.

Dr. John L. Masters described in technical detail all the conditions and symptoms found about the right eye and concluded that—

this inflammation must have been traumatic, acute catarrhal conjunctivitis, purulent conjunctivitis or trachoma. The appearance of the eyeball and lids at this time, in the absence of definite history, would lead me to believe the trouble had been trachoma.

It has not been claimed that the disease of the soldier's eyes was the result of traumatism.

Either purulent conjunctivitis or trachoma would be the result of infection. This position indicates that catarrhal conjunctivitis would produce the conditions found.

Dr. H. Alden Adams made an affidavit in May, 1901, in which he recites as follows:

A careful examination of the eyes convinces me that the loss of vision was due to trachoma (granulated lids). Upon inquiry as to the beginning of the trouble and the following symptoms and course of the disease, I feel my first diagnosis to be the correct one.

He also says the history of the case as given him of exposure followed by severe catarrhal conditions and the gradual increase in severity all point to trachoma as the correct diagnosis.

A board of surgeons at Washington, D. C., examined claimant's eyes on October 5, 1893, and reported their opinion that the disease was evidently the result of syphilitic infection in the past, and that claimant admitted that he had chancres years ago.

A board of surgeons at Indianapolis examined the claimant on May 28, 1902, and reported as to the condition of the right eye that there was trachoma, blepharitis, and pterygium, and also opacity and pannus. The report recited the claimant's statement that this condition resulted from acute inflammation resulting in chronic inflammation and adhesions.

The reports of other medical examinations describe the conditions found and the resulting degree of disability, but assign nothing as to cause of the disease. Upon this evidence presented the Bureau has decided that the affliction of this soldier's eyes is the result of gonorrheal infection. The medical evidence filed by the soldier, while it does not distinctly confirm, yet it does not overcome the weight of evidence and probability, from the history of the soldier's habits, in favor of the decision reached by Dr. Thompson as to cause of the disease of eyes which has resulted.

There is no necessary conflict between the decision of Dr. Thompson and the exhibits made by all of the medical testimony in the case, except the certificate which attributes the disease to syphilis. Based simply upon a history of cold, exposure, and catarrhal inflammation, as given by the soldier and recited by comrades, the physicians described the symptoms found. These symptoms are entirely consistent with the theory of gonorrheal origin, according to expert medical authority, and when the history of the case shows conclusively the renewed and repeated existence of gonorrhea the medical division of the Bureau seems properly justified in charging responsibility of the loss of the sight of the right eye to the effects of gonorrheal infection.

This conclusion, which is accepted by the Department, disposes of the claim for restoration of pension under the general law.

There remains, however, another contention under the appeal as to the justice and propriety of the action of the Bureau in withholding the payments under the certificate issued under the act of June 27, 1890, for reimbursement.

This action would postpone any further payment of pension to this soldier, who is nearly sixty years of age, for about sixteen years, which, in his physical condition as shown, would probably be beyond the term of his life. As before stated, the ground of this action was that fraud had been perpetrated in the prosecution of the original claim for pension.

Against this charge the claimant protests most earnestly, and relies for vindication upon the fact that during all the years of the prosecution and allowance of his pension none of the evidence of the examining surgeons ever suggested gonorrhoeal origin until the special examination was made by Dr. Thompson in 1898.

The testimony of comrades as to the origin and existence of the inflamed and diseased condition of the claimant's eyes made no other suggestion of cause of origin, except to attribute it to a severe cold, for which they represent that the claimant was treated.

It is doubtful whether at the time of the filing of this claim there was one layman out of twenty who knew of the danger of disease of the eyes from gonorrheal infection. Indeed, the public ignorance upon this question was so great and serious that it is now almost the general practice at the hospitals and by physicians to warn and advise all patients afflicted with or who may be placed in proximity to such disease of the danger, and to instruct them in precautionary measures. To the layman and perhaps to some physicians in general practice, who are not specialists upon diseases of the eye, the distinction between trachoma, as diagnosed by several of the medical witnesses in this case, and gonorrheal ophthalmia, as decided by Dr. Thompson, is not understood and appreciated.

Shall this claimant, then, who frankly admitted, when asked, that he had several attacks of gonorrhea, be held to a guilty knowledge that his afflicting disease was the result thereof, without any other evidence anywhere in the case to indicate that he had such knowledge, and especially when the claimant knew, as he admits, that if his disease of eyes was the result of such gonorrhea he would lose his pension.

In repeated affidavits he has protested that he was entirely free from venereal disease when his eyes became sore, and his comrades have certified that they became sore while he had a cold.

Even stronger is the fact that the medical men did not at first diagnose gonorrheal ophthalmia, nor even did the medical division of the Bureau, with the several certificates of examination before it for consideration, together with the description given by the lay witnesses as to the objective symptoms of eye disease which were observed and testified to, adopt the conclusion of gonorrheal infection or even to be sufficiently impressed with any such theory as to instruct the examining boards to investigate for such cause of origin, until on December

5, 1893, after the report of the board of surgeons at Washington, D. C., of October 5, 1893, indicating syphilitic origin, when Dr. Swan M. Burnett, of this city, who examined the claimant on December 7, 1893, was asked to report whether he found "any evidence of venereal disease or vicious habits" and whether, in his "opinion syphilis is a factor in his disease of eyes."

Even with this suggestion for investigation Dr. Burnett answered those inquiries as follows:

The ulcer which has resulted in the cicatrix in the right eye may have been specific, but from its present appearance I could not say positively that it was. There may have been some iritis, but it must have been slight.

Instead of dropping the pension on the reports of the Washington board it was in fact increased from that date to \$8. With this conflict and uncertainty of opinion among learned and expert medical authorities it would not seem to be consistent to hold this soldier responsible for a fraud which involved a knowledge of cause and effect of disease and infection about which the general public are not even casually advised.

This unfortunate soldier enlisted as a boy of 17 years of age, served for three years, and was honorably discharged. He is now paying, and will continue through life to pay, a severe and terrible penalty for his indulgence in vice.

Except upon sufficient and convincing proof of guilty knowledge and of a purpose to commit a fraud he should not be also required to forfeit the benefit of the pension awarded him under another law for disabilities admitted by the medical referee to be entirely free from any evidence of having resulted from vicious habits. The principle involved in this case has been long established and followed by the Department. Especially has the question been settled definitely since the elaborate opinion of the Assistant Attorney-General George H. Shields, rendered December 3, 1889, and printed in volume 6, Pension Decisions, page 297, and again reaffirmed on April 29, 1892, in an opinion rendered by him, in the case of William W. Dudley (6 P. D., 208). Following an extensive and exhaustive review of all the precedents and decisions germane to the question, this decision was practically condensed and expressed in these following words:

In those cases where the overpayment is the result of fraud on the part of the pensioner or of a mistake of fact, the Government may reimburse itself by withholding the accruing pension until the amount overpaid is made good, but that there is no authority to withhold pension money to offset moneys which may have been paid out as pension as the result of an erroneous judgment on the evidence in any given case.

In the case at bar, proceeding upon the theory which the Department adopts that the decision of Dr. Thompson is correct as to the origin of the diseased eye, we can not find that there has been proven a fraud upon the part of the soldier.

Giving all reasonable weight to his alleged admission to Dr. Thompson, that his trouble was due to gonorrheal ophthalmia, which admission he denies, and the doctor does not remember, but assumes its truth from his report, it is not difficult to understand that when interrogated by the physician the soldier admitted the fact of the gonorrhea, and then being told by the physician that that disease was responsible for his affliction he may have submitted to the judgment of the physician and admitted the possibility that such infection might have caused his trouble. But this does not amount to such an admission against interest as to establish that a fraud had been committed thirteen years before that time in prosecuting his claim for pension.

This case seems clearly one in which there has been an error of judgment and decision on the part of the Bureau, and of failure to prosecute in the beginning the special investigation which it ordered upon an application for increase in 1898. There was a record of syphilis in the case, there was the lay testimony describing the condition of claimant's eyes, and there was available to the Bureau an equal opportunity for special and expert investigation as to the cause of this diseased eye in 1885 as there was in 1893 and in 1898.

After reviewing fully all of the evidence and exhibits in the case it is the conclusion of the Department that your action of rejection of the claim for restoration is warranted, and such action will therefore be affirmed. But it is further decided that the charge of fraud against the claimant has not been sustained, and that therefore the Bureau is in error in withholding his pension under the act of June 27, 1890.

SERVICE—DRAFTED MAN—EVIDENCE—ACT JUNE 27, 1890.

CATHERINE PARCELL (WIDOW)..

It appearing from a report from the Auditor of the Treasury for the War Department, filed since this case was previously decided, that claimant's husband was drafted June 8, 1864, failed to report, was arrested September 12, 1864, and examined October 10, 1864, and rejected, it is held that he did not serve ninety days within the meaning of the act of June 27, 1890.

The former decision in this case, reported in 13 P. D., 450, based on the evidence then in the case (the Chief of the Record and Pension Office having declined to furnish the above facts), is overruled.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, July 29, 1903.

Your communication of July 24, 1903, in which you returned the papers in the case of Catherine Parcell, widow of William Parcell, an unassigned drafted man, Fourteenth Congressional district, Ohio (Claim No. 620670), asking reconsideration of the departmental decision of

April 27, 1903, in connection with a certain report of the Auditor of the Treasury for the War Department, new evidence in the case, has been received and carefully considered.

A more detailed history of this case will be found in the opinion of April 27, 1903, which has now been published (13 P. D., 450). Briefly, Catherine Parcell's application for a widow's pension under the act of June 27, 1890, was filed September 16, 1895, and rejected March 12, 1896, on the ground that soldier had not been mustered into the service of the United States. She appealed June 25, 1901, and this Department, in the decision to which allusion has been made, reversed your action. The finding of the Department on the issue involved was:

Soldier was formally discharged by the customary certificate after a service of more than five months, as shown by the records of the War Department. In the absence of any evidence to the contrary, it will be presumed that he served ninety days or more "actual service" in the war of the rebellion. The widow is therefore pensionable.

The soldier himself was a pensioner under the act of June 27, 1890, from November 7, 1891, to April 3, 1893, when he died. No question was raised in his lifetime as to his military service. Preliminary to the admission of his claim, the War Department was called upon for an official statement as to the applicant's military history. Under date of August 5, 1891, the Chief of the Record and Pension Division of the War Department reported that "the rolls show that William Parcell, mentioned in the preceding indorsement, was enrolled June 8, 1864, and discharged November 12, 1864, on surgeon's certificate of disability." The said certificate is on file and corresponds with said report.

On May 31, 1895, the Chief of the Record and Pension Division submitted this report to your Bureau—a report entirely at variance with the first statement furnished in the case:

Respectfully returned to the Commissioner of Pensions, with the information that it has been determined by this Department that the within-named William Parcell, unassigned drafted man, Ohio, was never in the military service of the United States, he having been rejected by the board of examination and inspection because of "contraction of the flexor tendons of the right thigh."

Under date of February 6, 1896, the War Department was requested to furnish information "showing whether this man was examined by the board of enrollment at Wooster, Ohio, and held to service," and on February 11, 1896, this, the third report, was submitted:

Respectfully returned to the Commissioner of Pensions, with the information that no record has been found showing whether this man was examined by the board of enrollment at Wooster, Ohio, and held to service.

These later reports not being in harmony with the facts to be inferred from soldier's certificate of discharge, the War Department was again asked to furnish further information, especially with refer-

ence to said certificate. On May 5, 1901, the fourth report was transmitted to the Commissioner of Pensions:

William Parcell, unassigned drafted man, was not accepted into the military service of the United States under his draft of June 8, 1864, but was rejected on account of a physical unfitness for that service. The discharge certificate herewith returned was improperly issued to him and is of no value as evidence that he was in service, since the official records show positively to the contrary.

The case then came to the Department on appeal. The facts reported by the War Department showed, *prima facie*, such a service as the provisions of the act of June 27, 1890, required. The facts in evidence did not accord with the second report of the War Department, wherein it was said, "it has been determined by this (War) Department that * * * William Parcell * * * was never in the military service of the United States." Apparently the War Department was in possession of certain material facts not in evidence before this Department—a Department charged by law with the determination of all questions relating to the pensionable status of a soldier. Exercising in these matters, as they come before this Department on appeal, judicial functions, and being governed by the general rules of evidence by which courts are bound, while feeling that the opinion of a Government officer upon those matters concerning which he has special knowledge should be entitled to due consideration, yet, in the complete discharge of its duties, this Department recognized the elementary rule that its decisions must be rendered upon facts shown by competent evidence, and not wholly upon the dictum of some officer not charged by law with the adjudication of questions peculiarly within the province of the Department of the Interior. Accordingly, on February 28, 1903, the papers in this case were returned to the Commissioner of Pensions, with instructions to make a further call upon the War Department for a report as to those facts upon which said Department had "determined * * * that * * * William Parcell * * * was never in the military service." The opinion of February 28, 1903, was, in part, as follows:

On the face of the evidence this man performed five months' service. If the "official records show positively to the contrary," the facts they show should be in evidence in this case and before the Department in order that it may determine the case upon all the evidence. If this soldier was taken from his home at Wooster, Ohio, and held in barracks for five months before the authorities could determine whether or not to reject him, under former decisions of this Department he would be pensionable.

The papers are herewith returned to you with instructions to make a further call upon the War Department for a statement of the facts upon which they decide that soldier was never in the military service, and especially for a report as to whether the official records show if soldier was taken to the rendezvous and how long he was detained there. Such information as the War Department may possess regarding the whereabouts of soldier from June 8 to November 12, 1864, should be ascertained.

It will be observed that a courteous request was made for specific information upon points absolutely essential to a determination of a

soldier's pensionable status, at once just to the Government and to the claimant.

Instead of furnishing the desired information, however, the Chief of the Record and Pension Office of the War Department, on March 21, 1903, furnished this report:

Respectfully returned to the Commissioner of Pensions, inviting attention to the circular of this Department, dated November 2, 1901, copies of which were furnished the Commissioner of Pensions November 9, 1901, from which circular it will be seen that a statement can not be furnished showing the facts upon which it was determined by this Department, from the records in its custody, that the within-named William Parcell was not in the military service of the United States.

The circular to which he referred concludes as follows:

Whenever facts relating to military status or service are to be judicially determined, the records of the War Department are to be produced for judicial consideration. Whenever information as to such facts is required merely for executive action by other departments, the War Department will answer all proper inquiries in relation thereto, but will not furnish copies of its records, or statements from them, to enable the officers or employees of other departments to make independent decisions upon purely military questions.

In short, the Chief of the Record and Pension Office refused to furnish information within his knowledge to this Department—facts pertinent to the issue; facts essential to a determination of the question raised on appeal. This Department was asked, in effect, blindly to consider itself bound by the arbitrary opinion of an officer in another Department of this Government—an officer not charged by law with the determination of questions arising in the administration of the pension laws.

This Department was not to concern itself with facts; it was sufficient if some officer who knew the facts passed judgment upon the case and certified his opinion to this Department.

In the opinion of April 27, 1903, however, this Department held, and very properly, that—

The opinion or conclusion of the Chief of the Record and Pension Office of the War Department, based upon certain alleged facts within his knowledge, but not within the knowledge of this Department, that soldier was never in the service of the United States, is not evidence that can be considered in this case. Facts formally reported by the custodian of records in the War Department are, under our practice, treated as evidence properly introduced. But the conclusions of some officer drawn from facts within his knowledge are not, and can not be, treated by this, or any other tribunal, as evidence. Only the alleged facts adduced from records in his custody, upon which his opinion is based, would be competent evidence upon the point in issue in this appeal; and a statement of such facts as may warrant the opinion that soldier was never in the service of the United States is refused.

The case, consequently, was determined upon the competent evidence in the case. The only record of facts reported by the War Department showed, on its face, a service extending from June 8 to November 12, 1864. In the absence of any evidence to the contrary, actual service, within the meaning of the act, it was held, must be

presumed from this record. The conclusion of said opinion is as follows:

The soldier's pensionable status was accepted by the Bureau of Pensions upon the same evidence, i. e., competent evidence, that is in the widow's case—the opinions of officers of the War Department not being regarded as evidence. That action should be treated as conclusive to the widow's claim in the absence of additional evidence that would justify a contrary conclusion.

Upon the return of the papers to the Commissioner of Pensions, in view of the conclusion of said opinion intimating that the decision of this Department was predicated upon "the absence of additional evidence that would justify a contrary conclusion," the Commissioner of Pensions, under date of July 14, 1903, requested the Auditor of the Treasury for the War Department for a report of facts within his knowledge that might be pertinent to the issue before this Department. The Commissioner's letter was as follows:

For use in connection with the claim of Catherine Parcell as widow of William Parcell, unassigned Ohio Volunteers, No. 620670, I have to request that with the return of this letter you will advise me as to the amount paid the alleged soldier, William Parcell, and whether such amount was for services or for expenses of going from his home to the rendezvous under draft order and his return from the rendezvous to his home.

If the records in your possession furnish such information, I would be pleased to have it definitely stated separately the amount he received for services and the amount for expenses.

In response to this letter the Auditor submitted the following report:

In the case of William Parcell, late unassigned drafted man, Ohio Volunteers, the records of this office do not show any payment. The Record and Pension Office, War Department, reports that he was drafted June 8, 1864, failed to report, was arrested September 12, 1864, and examined October 10, 1864, and rejected.

Here, at last, are the facts upon which the Chief of the Record and Pension Office of the War Department apparently based his opinion that the soldier was never in the military service of the United States; the facts that should have been before this Department before its opinion of April 27, 1903, was rendered; facts that entirely alter the case; facts that demonstrate conclusively that neither soldier enjoyed nor his widow enjoys a pensionable status under the act of June 27, 1890; facts that this Department persistently and courteously endeavored to secure in evidence; facts a statement of which was furnished to the Treasury Department and denied another coordinate Department of the Government. In consequence this Department rendered a decision which, while entirely proper and in accord with the evidence then in the case, is no longer tenable in view of this new evidence.

It is not necessary to discuss the question as to whether or not soldier was ever in the military service; it is certain that he did not render the ninety days' actual service required by the act of June 27, 1890.

From June 8, 1864, to September 12, 1864, he was in desertion. Arrested on the latter date, he was discharged on November 12, 1864. Even if it should be admitted that he was in the service from September 12 to November 12, 1864, it is obvious that he did not serve ninety days. The widow is, therefore, not entitled to a pension.

Upon reconsideration, the Department overrules so much of the opinion of April 27, 1903, as reverses the Bureau's action of March 12, 1896. Said action is affirmed.

PRACTICE—RECONSIDERATION—RULE 18.

HENRY C. MECHLING.

The action of the Bureau in the case having been affirmed on appeal and a motion for reconsideration of said decision overruled, this second motion to reconsider is overruled under rule 13, Rules of Practice, as the same does not disclose that any material feature of the case had not been fully considered nor that there was error of fact or in the application of the law.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 29, 1903.*

The above-named soldier is now a pensioner at the rate of \$17 per month on account of gunshot wounds of his left arm and shoulder.

A claim for further increase of pension, filed December 27, 1897, was formally rejected July 11, 1899.

The Department on appeal affirmed that action in a decision rendered November 11, 1899.

A motion for reconsideration of said decision was filed in the Department March 16, 1900, and said motion was overruled in a communication dated April 30, 1900.

On June 12, 1903, after the lapse of more than three years, the pensioner filed another motion for a reconsideration of said decision, but in this motion he does not mention the fact that a prior motion was filed and overruled.

He refers, however, to an affidavit of Dr. Frank P. Vale, which was filed with the prior motion and fully considered in the Department's communication of April 30, 1900. Upon a consideration of all the facts then presented it was held that there was no good reason for reversing or modifying the former departmental decision.

No additional testimony has been presented, but in the present motion for reconsideration the pensioner refers to the fact that he receives commutation for the loss of use of a limb, and he insists that he was entitled to a higher rate of pension. He should bear in mind that the action of the Surgeon-General's Office of the War Department, where this class of claims are adjudicated, is independent of that of the Pension Bureau. His claim for such commutation was no doubt established in accordance with regulations of the War Depart-

ment, as provided by law, and his claims for pension and for increase thereof must be established in accordance with the law and regulations prescribed in this Department. Neither Department is bound by the action of the other in cases of this character.

The report of the official examination under the claim in contention, made December 5, 1898, is quoted in the aforesaid decision. It showed conclusively that neither the left arm nor the left hand was wholly disabled. It is stated in said report that all motions in the arm and forearm are intact, although the arm is very much weakened. The conditions described, even including the injury of the fingers of the left hand, alleged as a remote sequence of the wounds, do not cause a degree of disability equivalent to the loss of a hand or foot, which is prerequisite to the allowance of the next higher rating.

The present motion for a reconsideration is overruled. Under rule 13 of the Rules of Practice it should not have been entertained, for it did not disclose any material feature of the case that had not been considered.

COMMENCEMENT—INCREASE—ACT JUNE 27, 1890—SECTION 4698½ OF THE REVISED STATUTES.

JOHN MIDDLETON.

Increase under the act of June 27, 1890, must commence from the date of medical examination, as provided by section 4698½ of the Revised Statutes, showing an increased inability to earn a support by manual labor.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, July 29, 1903.

John Middleton, who served in Company B, One hundred and eighty-fourth New York Infantry, is at present a pensioner under certificate No. 815169, and act of June 27, 1890, at \$12 per month.

His disabling causes are rheumatism, disease of rectum, and loss of right leg.

He was originally pensioned at \$6 per month, from November, 1891, on account of rheumatism and disease of rectum.

Soldier's right leg was, as the result of an accident, amputated below the right knee May 18, 1901.

He filed a claim for increase June 17, 1901, alleging this new disabling cause.

March 8, 1902, his certificate was reissued to include the loss of the leg and his rate was increased to \$12 from November 6, 1901, the date of the medical examination held under the claim.

In an appeal filed by soldier's attorneys March 27, 1902, it is contended soldier was—

just as much entitled to \$12 per month from June 15, 1901 (date he executed his declaration for increase), as he was November 6, 1901 (the date of his medical examination), since his leg was amputated May 18, 1901.

In other words, because the new disabling cause is specific in character it is contended that increase should begin from the date of filing the declaration and not from the date of the medical certificate held thereunder.

This is not a claim for increase under the general law on account of a permanent specific disability. If it were the increase would have been made to commence from an earlier date even than that contended for by appellant, for it would date not from the medical examination or even the date of filing the declaration for increase but from the date of amputation. See section 4698½ of the Revised Statutes and claim of John E. Lamb (8 P. D., 191).

Title to pension under act of June 27, 1890, is based upon an applicant's inability to earn a support by manual labor in whole or in part.

If a rate is granted because of partial inability to earn a support and the accepted disabling cause or causes become aggravated or a new cause appears an application for an advance in rate is a claim for increase (George Jacob, 7 P. D., 39), and an increase in rate must date from the medical certificate made under the claim, as provided by section 4698½ of the Revised Statutes. See also Isaac Turner (7 P. D., 523).

This claim is one for increase under the provisions of the act of June 27, 1890.

If title to increase is shown it must be by reason of a cause or causes which further and materially impair the ability of the applicant to earn a support by manual labor. His rate was not increased because of a more extended or aggravated condition of a preexisting and accepted disability, but for the reason that a new factor which would impair his ability to support himself by manual labor had been introduced.

His increase, in other words, was not specifically because of the lost leg, but because of increased loss of ability to labor.

The loss of the leg is only one of several contributory disabling causes. It is unquestionably specific, but the others are not. Together they have been held to wholly disqualify the soldier from labor. It is not permissible to segregate one disabling cause and treat it as it would be under the general law and leave the others to be treated as to their effects and commencement of increase based thereon, subject to the provisions of the act of June 27, 1890.

It is soldier's condition from all causes not due to vicious habits that is to be considered.

Suppose soldier had no other disabling cause than the amputated leg. He would then have only a specific disability. There would be an original allowance. Would his rate commence, under the act of June 27, 1890, from the date of amputation? Certainly not. It must be by the terms of the law begin on the date when the declaration was filed, but said disabling cause presenting itself thereafter does not

warrant its treatment as an original issue, but as an auxiliary one whose effects upon title to a higher rate necessarily demand that the increase commence from the date of the examining surgeon's certificate, as provided by section 4698½ of the Revised Statutes.

The provisions of section 4698½ of the Revised Statutes relative to date of commencement in cases of specific disabilities have no effect to warrant an increase of rate under the provisions of the act of June 27, 1890, from any other date than the certificate of the board of surgeons held under the claim.

Action affirmed.

SERVICE—TERMINATION OF WAR OF THE REBELLION.

ANNIE TAYLOR (WIDOW).

It being shown that this soldier was accepted into the volunteer service in May, 1865, as under the authority of the act of Congress of July 17, 1862, "An act to suppress insurrection, etc., * * *" and that his enlistment was in Georgia, a State wherein the war of the rebellion yet, according to the President's proclamation of April 2, 1866, subsisted, such enlistment is established as one for the purposes of said war, and his service under it was presumptively war service and is pensionable service under the act of June 27, 1890.

This particular presumption as to the character and purpose of his service outweighs the general presumption arising from the fact of the practical cessation of hostilities in July, 1865; and his service after July, 1865, should be presumed to have been of the same character and for the same purpose as that before that date, such service being shown to have been rendered in said State of Georgia, wherein, according to said proclamation, said war did not end until the date of said proclamation.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 31, 1903.*

The appellant, Annie Taylor, on April 26, 1902, filed this claim, No. 761752, for pension under the act of June 27, 1890, as widow of Isaiah Taylor, who was a member of Company G, One hundred and thirty-eighth United States Colored Infantry, from May 1, 1865, to January 6, 1866, and who died September 9, 1896.

Said claim was rejected February 20, 1903, on the ground that—

The soldier did not serve for ninety days during the war of the rebellion within the meaning of the act of June 27, 1890. (See ruling of honorable Commissioner dated January 29, 1903.)

And on February 24, 1903, the claimant appealed, contending that—

The intent of the law was to allow pension to soldiers and their widows who enlisted prior to the close of the war of the rebellion and served ninety days and were honorably discharged.

On March 30, 1903, the papers were returned to the Bureau for a copy of the ruling of January 29, 1903, referred to in the rejection of

the claim; and on April 15, 1903, they were again returned for a call upon the War Department for a report as to the station or stations of the soldier's command during his service and as to whether it was engaged during that period with the enemy.

The papers have been finally transmitted, with a copy of said ruling and with a report from the War Department.

Said ruling is as follows:

BUREAU OF PENSIONS, OFFICE OF THE COMMISSIONER,

January 29, 1903.

Claim No. 1,118,581, Frederick Benham, alias Frederick Williams, G, One hundred and thirty-sixth United States Colored Volunteer Infantry.

Mr. DALTON,

Chief Board of Review.

This claim will be rejected upon the following grounds:

First. The claimant, aided by special examination, is unable to show by competent testimony that he is identical with the soldier of record.

Second. The soldier upon whose service the claim is based did not serve ninety days during the war of the rebellion.

* * * * *
The soldier of record did not enlist until May 1, 1865. His company was stationed at Atlanta, Ga., and Augusta, Ga., during his entire service. It is not shown that the service rendered by the soldier of record was in direct connection with active military duty in aid of suppressing the rebellion.

While the Department has held that any enlistment in any other (than loyal States) of the States, Territories, and District of Columbia, made after June 1, 1865, of any white or colored troops will not be deemed an enlistment in or for the war of the rebellion, and that any service rendered under an enlistment or reenlistment subsequent to June 1, 1865, is presumptively not a service in the war of the rebellion, I can not find that it has been specifically held that service rendered under an enlistment prior to that date in a disloyal State is sufficient to give title to pension under the act of June 27, 1890, provided less than ninety days' service was rendered prior to that date.

The following order was issued by the Provost-Marshal-General April 29, 1865: "The Secretary of War having directed that the recruiting of men in the loyal States for the volunteer forces be stopped, now directs that the recruitment for the volunteer forces of all persons, including colored men, in all States be embraced in the order and their enlistment discontinued."

It will be seen that the enlistment of the soldier in this case on May 1, 1865, was subsequent to the issuance of the order above noted, and I am of the opinion that he did not render a service of ninety days or more in direct connection with active military duty in aid of suppressing the rebellion.

In the case of John Barleyoung the Department held that service rendered after July, 1865, will be presumed to have not been in said war, reference being made to the decision in the case of Jeremiah Butler (vol. 7, P. D., p. 214). No specific date in July, 1865, is named in the Barleyoung decision, but in the Butler case the Department states that recruiting for the war of the rebellion ceased immediately after Lee's surrender, April 9, 1865, and muster out began April 29, 1865; that the last battle or skirmish is reported to have been fought May 13, 1865, and the last Confederate force surrendered May 26, 1865; that the blockade was raised by proclamation June 23, 1865, and General Grant's final official reports of military operations bear date July 22 1865. If July 22, 1865, be accepted as the date after which service will be pre-

sumed not to have been during the war of the rebellion, the soldier in this case did not serve ninety days during said war, and therefore has no title to pension under the act of June 27, 1890.

On June 15, 1903, this Department addressed the following letter to the War Department:

Will you kindly furnish this Department with data as to the authority of law under which the One hundred and thirty-eighth United States Colored Infantry was enlisted and mustered into the service of the United States?

In Series III, Vol. V, of the War of the Rebellion Official Records, page 661, it is stated that the "recruitment" of colored troops was ordered stopped on April 29, 1865, and yet still further on the same page it is stated that the last organization of colored troops was mustered in July 15, 1865.

The importance of this matter will become apparent by reference to an order or ruling of the Commissioner of Pensions under date of January 29, 1903, herewith inclosed.

Were the members of the One hundred and thirty-eighth United States Colored Infantry enlisted for the purpose of suppressing the rebellion?

Attention is called to page 655 of the Rebellion Records (*supra*), wherein section 11 of the act of July 17, 1862, is quoted. Was that the authority under which a colored soldier was enlisted as a volunteer on May 1, 1865, in the One hundred and thirty-eighth United States Colored Infantry?

With your reply please return the inclosure.

To this letter the War Department responded June 24, 1903, with the following report by the Chief of the Record and Pension Office of that Department, dated June 23, 1903:

It is true that the recruitment of colored troops was stopped by an order of the Secretary of War, dated April 29, 1865, but it was subsequently resumed in certain localities by the Secretary's authority, and was continued until June 1, 1865. On the latter date the Secretary of War directed that "all enlistments of colored troops be immediately discontinued throughout the United States."

On the 11th of May, 1865, the War Department was informed that Maj. Gen. J. H. Wilson had "organized, armed, and equipped three regiments of negroes from the refugees in Mississippi, Alabama, and Georgia," and on May 18, 1865, special authority was given by the Secretary of War to General Wilson to "retain and muster them in as three-years men." The One hundred and thirty-eighth United States Colored Infantry was one of the regiments the acceptance of which was thus authorized. It was not mustered into service until July 15, 1865, but, as before stated, it had been previously organized, armed, and equipped. The enlisted men were enrolled at Macon, Ga., May 1, 1865, and the regiment was mustered into service July 15, 1865, at Atlanta, Ga. No citation of the statute under which the One hundred and thirty-eighth United States Colored Infantry was organized has been found on the records of that regiment, but it is understood that, like other colored regiments, it was received into service under the provisions of section 11 of the act of July 17, 1862. (12 Stat. L., p. 589.)

For information as to the views of this Department on the question of whether or not members of organizations such as the One hundred and thirty-eighth United States Colored Infantry were enlisted for the purpose of suppressing the rebellion, attention is invited to the opinion of the Judge-Advocate-General of the Army, concurred in by the Acting Secretary of War, June 22, 1895, in the case of John Jones, Company G, Fortieth United States Colored Infantry, a copy of which is herewith inclosed.

The opinion of the Judge-Advocate-General referred to in said report is as follows, dated June 21, 1895:

Section 2 of the pension act of June 27, 1890, grants pensions to "all persons who served ninety days or more in the military or naval service of the United State during the late war of the rebellion," etc.

In a decision of the Assistant Secretary of the Interior, dated December 8, 1894, it is said:

"The words used in the act of June 27, 1890, 'during the war of the rebellion,' would seem to indicate that the entire period of its existence as a political status was meant, i. e., to August 20, 1866, according to the decision of the Supreme Court cited. Service rendered, therefore, up to that date might constitute a pensionable term of service under this act as having been rendered 'during' the war.

"It is not believed, however, that Congress intended to pension those whose rendition of service, military or naval, had no connection whatever with the belligerent operations of the war, was not upon the theater of the conflict, and had nothing to do with the objects and purposes of the war. To give this act such a construction would result in pensioning a military official stationed during possibly the whole period of the war in a foreign country or in a distant locality of the United States, engaged in the performance of duties having nothing whatever to do with the war; or, likewise, a person in the naval service, who was stationed in Alaska or elsewhere, engaged, possibly, in protecting fisheries, or in the performance of other ordinary naval duties not in any way connected with the war. Service pensions have been uniformly granted by Congress only in view of the fact that the services were rendered in some necessary connection with and in pursuance of the objects sought to be attained by the particular war under consideration, and it is not believed Congress intended, in this case, to depart from such uniformity so as to create the anomalies and incongruities in practice which would necessarily result therefrom, as in the cases mentioned.

"It is a well-known historical fact that the war was practically ended, so far as actual belligerency was concerned, in July, 1865 (case of Jeremiah Butler, vol. 7, P. D., p. 214). Active hostilities then ceased, as they ceased in the case of the Mexican war, on February 2, 1848, at the signing of the treaty (Instructions to the Commissioner of Pensions, vol. 7, P. D., p. 240). The war still subsisted, however, and pensionable service may have been rendered thereafter, both in and during the war, until it was finally terminated as a status, which will be held, in accordance with the decision of the Supreme Court cited, to be August 20, 1866. But the question, in any case, whether service rendered was connected with the war, as part of its operations, is one of fact, and as such is governed, in proof, by legal presumptions the same as in other cases. In view of the fact that belligerent hostilities had ceased in July, 1865, it will therefore be presumed that any service rendered after that time was not rendered in, although during the war of the rebellion, and the burden of proof is upon claimants to show by direct and positive evidence that their service rendered thereafter was a part of the operations of the war, and made for the attainment of the purposes declared in the proclamation of August 20, 1866, to have been finally attained."

The Commissioner of Pensions now asks, with reference to the case of Private John Jones, Company G, Fortieth United States Colored Infantry, who enlisted April 26, 1865, and was discharged April 25, 1866, whether he had a service of ninety days that may be regarded as a necessary part of the belligerent operations; and I am called on by the Chief of the Record and Pension Office for an expression of opinion as to what should be held to constitute "belligerent operations."

If serving in the Army or Navy during the war was not in itself engaging in military operations it would seem that the decision of the Assistant Secretary of the

Interior has imposed a condition which the law does not require. By the language of the act of June 27, 1890, *all persons* who served ninety days or more in the military or naval service of the United States during the war are made pensionable—*all*, and not a part only. The intention of Congress is best ascertained from the language they use. When, as in this case, the language is absolutely clear, we have no right to go outside of it in order to attach to it a meaning which it does not convey.

The Assistant Secretary of the Interior says:

“It is not believed, however, that Congress intended to pension those whose rendition of service, military or naval, had no connection whatever with the belligerent operations of the war, was not upon the theater of the conflict, and had nothing to do with the objects and purposes of the war.”

It would seem that the term “belligerent operations” is here used as meaning a personal participation in the active hostilities of the war. I do not think, however, that that is the true meaning of the term. When a State is at war it is engaged in belligerent operations; the power which it exercises to accomplish its purposes is its military power; the machinery which it uses is its army, and every soldier is a part of that machinery. He may never have gone to the front; he may have been kept at home for duty there; nevertheless he was performing duty which had to be performed, and by doing it was enabling the Government to keep some other man at the front, and no matter what his duty was he must have been, either directly or indirectly, engaged in the operations of the war. So that a soldier serving in the Army during the war should be held to have been engaged in belligerent operations.

That, at least, would be my construction of the expression.

This case arises principally under the decisions of the Department in the cases of John Barleyoung (7 P. D., 453) and Edward Farrell et al. (*ibid.*, 532), the former holding that—

1. The technical legal termination of the war of the rebellion was August 20, 1866.
2. Under section 2 of the act of June 27, 1890, service must have been rendered both during and in some necessary connection with the war of the rebellion as a part of its belligerent operations.
3. Service rendered after July, 1865, will be presumed to have not been in said war; and the burden of proof will be upon claimants to show by positive and satisfactory evidence that such service was in some actual connection with the war as existing at the time the service was rendered.
4. Service rendered after April 2, 1866, must be shown to have been rendered in some connection with the war as existing in the State of Texas.
5. Service rendered within the State of Tennessee after June 13, 1865, will likewise be presumed not to have been in said war, unless shown to have had some necessary connection with the war elsewhere.

And the latter decision holding that—

1. Enlistments in the loyal States after April 13, 1865, will not be deemed enlistments in or for the war of the rebellion, and any service rendered under such enlistments will be presumed not to have been rendered in the war of the rebellion, and to establish the contrary the claimant will be required to show affirmatively that his said subsequent service was rendered in direct connection with active military duty in aid of suppressing the rebellion.
2. Any enlistment in any other of the States, Territories, or District of Columbia made after June 1, 1865, of any white or colored troops will not be deemed an enlistment in or for the war of the rebellion, and any service rendered under an enlistment or reenlistment subsequent to June 1, 1865, is presumptively not a service in the war of the rebellion, and to overcome such presumption active war service in aiding the

suppression of the armed force of the Confederate States should be shown subsequent to such enlistment.

3. That enlistments in the United States Navy after July 1, 1865, were not enlistments in or for the war of the rebellion, and that any service in the United States Navy rendered after that date under any enlistment prior to July 1 is presumptively not service in the war of the rebellion, and the burden of proof to overcome the presumption is upon the claimant to show, by satisfactory evidence, that such service was active war or naval service in aiding the suppression of the rebellion.

The difficulty in this case, as in the case of Betty F. Nichols (13 P. D., 330), appears to be due to the Bureau of Pensions giving to the rules of evidence stated in said decisions a more restrictive and conclusive effect than is warranted by or properly deducible from the holdings of those decisions; and to be due particularly to not distinguishing the presumptions referred to therein as merely presumptions—in part, disputable presumptions of law and, in part, mere presumptions of fact. (See 1 Greenleaf on Ev., sec. 48 n.)

The presumption based, in the Barleyoung decision, upon the well known fact that the organized hostilities of the rebellion were practically ended in July, 1865, is a presumption of fact general in its nature, weak, requiring but slight evidence to overcome it in any particular case, and usually subservient to the disputable presumptions of law based, in that decision, upon the several proclamations of the President as to the cessation, in particular States, of said rebellion.

For instance, if service be shown to have been rendered after July, 1865, and before April 2, 1866, in some of the States named in the President's proclamation of the latter date, declaring the rebellion then at an end in those States, the presumption of law arises that such service was war service and pensionable under said act as construed by the Department; and this particular legal presumption should be sufficient to overcome the general presumption of fact that service after July, 1865, was not war service. This legal presumption, though a strong one, however, is a disputable presumption, and may itself be rebutted by showing, clearly and satisfactorily, that the service rendered had, in fact, no connection with said war or with its purpose to suppress the rebellion.

The opinion of the Judge-Advocate-General to the effect that any service during the war should be held to be belligerent service within the meaning of the act of June 27, 1890, is entitled, as that of the leading legal official of the War Department, to great consideration and respect, but it is not binding upon this Department upon such a question (see Jefferson M. Human, 12 P. D., 500), and is, respectfully, not concurred in by this Department.

It may, with entire respect to him as such official, be stated that he appears to have improperly confined his construction to a part only of the law and overlooked the familiar rule of statutory construction that not only all parts of the particular statute, but all other laws in *pari materia* with such statute must be considered in construing any

portion of the latter, and such construction must be given to such portion, however clear and unambiguous in itself it may be, as appears from all these to have been the probable intent of the law-making power; and this rule is especially applicable to pension legislation, which is legislation peculiarly *sui generis*, inspired by a broad and liberal public policy, and maintained from the inception of the Government on a high plane of practical beneficence, but yet with definite conditions and limitations, and with certain consistent purposes manifested throughout, all which it is the legitimate province of this Department alone to construe, and all which were considered by this Department in its decision in the Barleyoung case, with which particularly the Judge-Advocate-General differs.

The holding of the Barleyoung decision, therefore, that pensionable service under said act must have been actual war service rendered as part of the belligerent operations for the purpose of suppressing the rebellion, is adhered to; and the only question for determination under this holding is, as stated in that decision, the one of fact, whether any particular service was a part of such operations for such purpose. This fact may be established by either direct or circumstantial evidence, by actual proof of the fact, or by a presumption thereof. See *Fredricka Kent* (10 P. D., 211); and to this extent the dictum in the Barleyoung decision, that evidence to rebut the presumption therein referred to as arising from the fact of the general cessation of organized belligerent operations in July, 1865, must be "direct and positive evidence," may be modified. It was not necessary to the holding then made that such dictum should have been expressed, and it was not intended thereby to promulgate any rule as to that matter. The only point then intended to be considered was that the burden of proof would be upon a claimant whose service was after July, 1865, to show that such service was war service as defined in that decision. This showing, however, need be nothing more than satisfactory proof of the fact, and what is satisfactory proof thereof must depend upon the particular circumstances of each case viewed under the ordinary evidentiary rules as to proof of facts and as to presumptions and their rebuttal.

The general presumption of fact that service after July, 1865, was not war service is, as stated, a weak one; and the question raised by the Commissioner of Pensions in his ruling above quoted, as to what date in July, 1865, should be taken, service after which would be thus presumed not to have been war service, is of little importance, for this general presumption will usually, it is believed, be found to be controlled by stronger particular presumptions, either of law or of fact, arising from the facts as to the date, purpose, or place of enlistment or of service or as to the character of the organization as of the regular or of the volunteer forces, and controlled also by proof of the facts as to service rendered.

Furthermore, no particular date in July, 1865, can properly be fixed; for, as stated by the United States Supreme Court in *The Protector* (12 Wall., 700), cited in the *Barleyoung* decision, the

acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other.

This presumption is of importance principally as noting the transition of the war from a general to largely a local condition, proof of which, in fact or by particular presumption, will overcome this general presumption.

In *Franklin S. Cowan* (7 P. D., 374), the Department held that the date of enlistment is evidence in so far only as it may tend to show the purposes of enlistment, and that such purposes and actual service under such enlistment determine the question of pensionable service under said act. It is pertinently stated also in that decision:

No general rule can be laid down for determining facts decisive as to services being rendered in the war of the rebellion without disregarding other facts bearing upon the question as to the purposes of the enlistment and the military operations in which the claimant was engaged, and as such other facts enter largely into determining these questions, it follows that services giving title to pension under the act of June 27, 1890, must be determined by all the facts in the case.

In that case the soldier's second enlistment, April 10, 1865, was shown to have been for the purpose of service in said war, and this fact raised the inference accordingly that his service thereunder was for such purpose and was, therefore, pensionable service under this act.

In *Jeremiah Butler* (7 P. D., 214), however, an enlistment in the Regular Army July 25, 1865, was presumptively not for the purpose of said war, and service thereunder was, accordingly, presumptively not war service or pensionable service under said act.

This was the case also of *Barleyoung* and likewise of *Farrell et al.* (*supra*), wherein it was held:

Enlistment in the Regular Army after all organized hostile operations on the part of the enemy had ceased should not be treated as enlistments in, for, or during the war of the rebellion within the meaning of the act of June 27, 1890.

And that service under such enlistments was presumptively not war service, such presumption, however, being rebuttable by proof of actual war service.

In that case particular presumptions as to war or not war service under said act were stated as arising also from the fact of enlistment being in loyal or disloyal States, or being prior or subsequent to the date of certain orders of the War Department stopping further enlistments for the purposes of said war, particularly orders of April 13 and 29, 1865, as to all volunteer enlistments, and June 1, 1865, as to colored troops; also the President's proclamation of July 1, 1865, raising the naval blockade, naval enlistments, or service after that date, being presumed not to have been for the purposes of said war, and such service,

consequently, being presumptively not pensionable service under said act.

All these facts—the date, the place, the orders, the organization, of enlistment, etc.—are facts tending to show whether the enlistment was one for the purpose of suppressing the rebellion; and if an enlistment be thus shown to have been, in fact, for such purpose, the presumption of fact arises that the service under such enlistment was war service, and hence pensionable service under said act.

The pensionable character of service at its inception being thus established, the rule of proof as to presumption of continuance of an established fact or condition may be invoked to determine a pensionable period of service. (See 1 Greenleaf on Ev., sec. 41; 2 Wharton on Ev., sec. 1284; Abbot's Trial Ev., p. 353.) And this presumption of continuance is one which may properly be held to outweigh either the general presumption of fact that service after July, 1865, or the particular presumption of law, based on the President's proclamations referred to, that service in the States named in such proclamations, after the date thereof, was not war service.

This rule of proof was applied by the Department in the case of John G. Mulick (12 P. D., 186), wherein the sailor was shown to have been in war service up to July 1, 1865, and to have continued thereafter in actual service the same as before, with no change in the character of his service, the presumption being that his service after that date was of the same war character as that prior thereto.

In the present case this soldier's enlistment is shown to have been a volunteer one, so accepted by order of the War Department under the assumed authority of the act of Congress of July 17, 1862, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes" (12 Stat. L., 589); and to have been in a State wherein at that date the war of the rebellion was yet, according to the President's proclamation of April 2, 1866, subsisting.

This enlistment is shown, therefore, to have been in fact a war enlistment—one made for the purpose of suppressing the existing rebellion; and the presumptions arise that service under such enlistment was and continued to be, notwithstanding the general cessation of hostilities in July, 1865, war service. The general presumption from the fact of such cessation of hostilities is overcome by the stronger particular presumption arising from the proven character of the soldier's enlistment, and the latter presumption is strengthened by the fact that his service is shown to have been rendered in said rebellious State wherein he enlisted and wherein the war still, as stated above, subsisted.

The pensionable character and a pensionable period of service under the act of June 27, 1890, are, therefore, *prima facie* or presumptively established, and rejection of the claim is reversed.

DEPENDENCE—MEANS OF SUPPORT—ACT MAY 9, 1900.

MARIA ANN HOFRICHTER (WIDOW).

In computing a widow's net income in determining her dependency within the meaning of the act of May 9, 1900, the rental value of real estate which she occupies, albeit she derives no income therefrom, must be taken into consideration. The claimant in this case, having an income in excess of \$250 when the rental value of the house in which she lives is included in computing her income, is not pensionable within the meaning of the act.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 31, 1903.*

Maria Ann Hofrichter, as widow of Anton Hofrichter, late a musician in the Ninth Ohio Volunteer Infantry, applied for a widow's pension under the act of May 9, 1900 (No. 744595), on July 5, 1901. Her claim was rejected February 15, 1902, on the ground that her net income exceeds the sum of \$250 per annum. After an unsuccessful effort to have the claim reopened, she appealed April 5, 1902.

The case may be decided squarely on claimant's own statement—that one which shows on its face the smallest net income. She charges herself with the following property:

Lot 6, block 4, Stockwell's enlargement (vacant lot).	
Lot 7, block 4, Stockwell's enlargement (in which claimant lives).	
Lot 8, block 4, Stockwell's enlargement, rents at \$8 per month	\$96.00
Lot 9, block 4, Stockwell's enlargement, rents at \$8 per month	96.00
Lot 7, block 2, Brinkmeyer's enlargement, rents at \$6.50 per month	78.00
Lot 25, block 9, fourth enlargement, rents at \$9 per month	108.00
Total	378.00
Less rents lost in 1901	66.75
Total gross income	311.25
Expenditures, 1901:	
County taxes	\$67.35
City taxes	57.48
Insurance	14.53
Water rents	4.50
Repairs	25.00
	168.86
Net income, 1901	142.39

The assessed valuation of her property is as follows:

Lot 6, block 4	\$400 (no rent).
Lot 7, block 4	1,110 (in which she lives).
Lot 8, block 4	710 (rents at \$8).
Lot 9, block 4	710 (rents at \$8).
Lot 7, block 2	710 (rents at \$6.50).
Lot 25, block 9	810 (rents at \$9).
Total valuation	4,450

She, therefore, is living in the most valuable part of her property. Its rental value is not taken into consideration in estimating her

income. It should be. Suppose she was not living in that house, but rented it; her income would be materially augmented. In estimating a net income for the purposes of the act of May 9, 1900, personal living expenses are necessarily excluded, and rent, it is hardly necessary to add, is a part of one's cost of living as much as food and raiment. If one is so fortunate as to own property, thereby having no rent to pay, the rental value of the property she chooses to occupy must be taken into consideration in estimating her income. Were that not so it would work a grievous inequality. For instance, a widow owns notes and mortgages, property worth \$5,000, which, less taxes, yields her an income of \$260. She would not be pensionable. Another widow in the same place owns the same amount of property (in value), only in her case \$2,000 of it is represented in real estate in which she lives. Now, if this claimant's position is correct the productive value of \$2,000 of this woman's property would be eliminated; her income would therefore fall below \$250 and she would be pensionable, while the other, who possesses no more in value, would not be pensionable. Yet the first-mentioned widow would have rent to pay and the second one would not. To allow this method of computation to prevail, the claimant will readily perceive, would not be a just and equitable administration of the law.

So in the case at bar the rental value of the property which she occupies must be taken into consideration. What it is is not directly in evidence, but it is to be readily perceived that it must be at least \$10 per month. If property worth \$710 rents for \$8 a month and that which is worth \$810 rents for \$9 a month, surely property worth \$1,110 would yield an annual rental of \$120, and probably more. Adding the minimum estimate to the net income which she states she received in 1901 (\$142.39), the product is a net income of more than \$260.

She can not be deemed dependent, therefore, within the meaning of the law. The action of rejection is affirmed.

LINE OF DUTY—ACCIDENTAL INJURY.

DELBERT H. ENSOR.

The record shows that the soldier incurred the dislocation of his left arm, for which pension is claimed, while scuffling in the barracks and that he was not in line of duty.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 31, 1903.*

Delbert H. Ensor enlisted during the war with Spain, on July 25, 1898, as a private in Company D, Seventh U. S. Artillery, and was discharged February 27, 1899. March 24, 1900, he filed a claim for

pension, alleging that at Portland Head, Me., in 1899, he incurred a dislocation of left arm at the elbow, caused by a fall on the barracks floor while in the line of duty.

The claim was rejected April 19, 1901, on the ground that said dislocation of the arm was not incurred in the line of duty, as shown by the records of the War Department.

Under date of March 29, 1902, this appeal from said action of rejection was filed. The records of the War Department contain this entry as to the claimant:

February 18 to 27, 1899. Dislocated radius left arm, not in line of duty. Remarks: First sergeant of Battery D reported that Private Ensor received his injury while scuffling and not performing authorized athletics.

Two comrades, Clayton Crawford and George W. Ensor, made affidavits that they were present and saw the claimant fall while exercising upon the floor of the barracks in February, 1899, and that his left elbow was dislocated.

Dr. Harvey B. Bashore certified by affidavit that the claimant was sound at the time of his enlistment; that on March 10, 1899, he examined him and found an old dislocation of the arm, which had been properly reduced, but there was some muscular weakness for which patient was ordered a local application.

This is all the testimony filed by the claimant. It does not overcome the adverse record, made at the time in the service and based upon the official report of the sergeant of the battery to which claimant belonged.

There is no dispute about the fact that claimant injured his arm by a fall upon the floor of the barracks while in the service.

But the official record shows that he was indulging in scuffling in such a way as to put himself outside the line of duty and to assume personally all the responsibility for any accident or injury which might result.

The application of the rule as to what conditions place a soldier outside the line of duty in cases where injuries have been incurred while engaged in scuffling has been made in numerous cases, and the doctrine as laid down by Hon. Carl Schurz, Secretary of the Interior, in the case of William J. McPherson (5 P. D., 47) has been consistently followed. That decision was that a soldier is not in the line of duty while engaged in a voluntary scuffle, and claim for pension on account of a disability so contracted should be rejected.

In the case of Mary A. Wilson (6 P. D., 222) it was held that an injury received while a soldier was scuffling in a hospital in which he was employed as cook was not incurred in the line of duty, although the certificate of disability upon which he was discharged states that such injury was received in the line of duty.

There have been many cases in which this doctrine as to the line of duty has been adhered to and reaffirmed.

In the present case it is shown by the record that the claimant had placed himself outside of the line of duty at the time he received his injury, and hence your action of rejection upon the ground stated was properly entered, and the same is hereby affirmed.

ATTORNEYS—APPEALS—PRACTICE—DEATH OF PRINCIPAL.

CHARLES E. LANDON.

1. Where, during the lifetime of his principal, the attorney of record files an appeal in his behalf, the act being the act of the principal under the law of agency, the appeal is properly before this Department and may not be dismissed on the ground that the death of the principal, subsequent to the filing of the appeal, terminates the relation of principal and agent. In such cases, the filing of the appeal is soldier's act.
2. In those cases where the claimant dies subsequent to the action of rejection and before an appeal has been filed, the power of attorney not surviving, the attorney for claimant may not file an appeal because the agent can not do what his principal can not do; and the principal, being dead, is unable to take any further step in the prosecution of his claim. (Distinguishing this case from the case of Bates T. Certain, No. 115 current series.)

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 31, 1903.*

Charles E. Landon, late of Company G, Seventy-fourth Indiana Volunteer Infantry, was a pensioner under the act of June 27, 1890 (certificate No. 679311), at the maximum rate from July 30, 1890, until his death, December 27, 1902.

On December 10, 1887, he filed a declaration for a pension under the general law, based on rheumatism contracted, as he alleged, at Nashville, Tenn., in January, 1863. This claim was rejected November 19, 1889, upon his confessed inability to prove service origin. He afterwards filed certain affidavits with a view to reopen claim, which action the Bureau refused to take on June 23, 1902. Consequently, through his attorneys, Milo B. Stevens & Co., he appealed August 29, 1902.

There is no record showing incurrence of any disease in service.

Franklin Leader has signed two affidavits in which he states that soldier "complained" of rheumatism in service. In his reply to Bureau's inquiry, however, he states that he knows nothing about any disease, etc., contracted by soldier in the service. Dyer Havourd, also, has signed two affidavits, in which he states that soldier complained and suffered with rheumatism all the time and that he was treated by the regimental surgeon for rheumatism. On the other hand, in a letter dated January 5, 1888, the soldier stated that—

I have no one I can prove it by, as I never complained in the service. * * * I thought there was complaining and grumbling enough without me, and I kept still.

In another letter he states that he never had medical treatment until after his discharge.

Mr. Havourd never replied to the inquiry of the Bureau as to his personal knowledge of the subject-matter of his testimony.

There is another affidavit, signed by John W. Rich, in which witness states that soldier became very sore and lame in his limbs—in fact almost a cripple—this as a result of exposure to a storm of rain and sleet. He does not state that it was rheumatism; he relates this single instance of lameness and soreness, which is not infrequently a temporary result of exposure to inclement weather.

The evidence is clearly insufficient to establish service origin of the disease, and the action of rejection is therefore affirmed.

In your report accompanying the papers in the case you suggest dismissal of the appeal “for the reason that soldier has died since the filing of his appeal and it does not appear that the attorneys are authorized to appear” for the widow. There is not the slightest reason why they should be. The widow, in no proper sense, is completing the prosecution of this claim. This appeal was filed during soldier’s lifetime by his attorneys of record. All that was necessary to be done or that could have been done to bring the case within the appellate jurisdiction of this Department was done while soldier was still living. This, then, is not a case for dismissal; it is clearly distinguishable from those cases where the soldier’s attorney attempts to file an appeal from an action taken in soldier’s lifetime, after the soldier had died. In those cases the power of attorney died with the principal; the attorney, therefore, would have no right to take any further step in his principal’s name, because he no longer is authorized to represent said principal. But in the case at bar, the attorney did all that he, under any circumstances, could do while his principal was still living and while his agency still retained vitality. The case, then, from August 29, 1902, when the appeal was filed, was properly before this Department for consideration. The attorney’s act was his act, taken at a time when he could act. In cases where dismissal is proper the principal, being dead, can not act; and it would be an absurdity if the agent could do what his principal could not. This is the distinction.

ADULTEROUS COHABITATION—EVIDENCE—ADMISSIONS.

EMILY CLAGGETT (WIDOW).

The admissions or confession of the claimant in this case do not show such conduct on her part as would bar her, under the act of August 7, 1882, from a pension under the provisions of the act of June 27, 1890, as the same was not open and notorious.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 31, 1903.*

This is the appeal of Emily Claggett, widow of James Claggett, deceased, who served from 1863 to 1866 in Company F, Fifty-eighth

United States Colored Volunteer Infantry. She filed a declaration, No. 537633, under the act of June 27, 1890, on January 7, 1892. Her claim was rejected October 3, 1900, on the ground that claimant had been guilty of open and notorious adulterous cohabitation since August 7, 1882, as shown by her admissions to the special examiner. From this decision she appealed on October 22, 1900.

In her original deposition she denies that she had ever "lived openly in the house with any man" since her husband's death. She admitted that she had sexual intercourse with different men, and often for money consideration. As to the last intercourse of this character she testified as follows:

The last one I had was Anderson Allen. I had him for a month or more and up to his death, five years ago.

In her sworn appeal she says:

I never knew a man by the name of Anderson Allen, and I am at a loss to understand how the special examiner could have made such a report. He went further and said the Government did not believe I led a virtuous life and threatened me with prosecution; and he said he did not want to get me into trouble. If I made any such statements as I am accused of it was because he scared me and I was confused, and as for living with any man in open and notorious adulterous cohabitation as set forth in the provisions of act of August 7, 1882, I emphatically deny that I ever violated the said act.

Since the filing of this appeal this case has been subjected to a careful and exhaustive special examination. It clearly appears that no intimidation, as alleged in the appeal, was used by the special examiner; but it does appear from the evidence adduced on the subsequent investigation of the case that her statements were utterly unreliable, as it has been shown that no such person as Anderson Allen ever lived in the neighborhood in which she lived, and that she could not have been guilty of all the acts to which she confessed. These facts are established by the testimony of reliable and disinterested witnesses. What caused her to make such statements does not satisfactorily appear, though she may have misconstrued the special examiner's explanation of her rights and his commentary on the pains and penalties following perjury, and may have been deceived by his manner of examining colored witnesses, as in his statement of March 4, 1903, he said:

Besides, about the only possible way to get adverse testimony of this character from one negro against another is by first convincing him that you know it, and know that he knows it.

Or, as was stated by the other special examiner who was present and who witnessed the claimant's signature, "the question of adulterous cohabitation was the most frequent one under examination and I often succeeded in securing confessions." In their effort to attain "success" in securing a confession their manner, though supposed to be that of an impartial magistrate, may have confused and deceived

the claimant, and thus they may have "succeeded" in extracting from her this confession, which has since been shown to be untrue. Be this as it may, the evidence does not clearly show that any intimidation was used, and her former deposition must be and is accepted as her voluntary statement. It, as well as her subsequent depositions, shows that she has been guilty of secret acts of fornication—a moral offense, but not a legal crime. In statements made to two different examiners she has admitted to acts of sexual intercourse with one Mills, but testified that they were infrequent and with no one else, and were unknown to her neighbors. A most searching investigation has failed to show that any stranger to these acts was aware of their commission, or of circumstances and facts which would cause any of her neighbors or acquaintances to suspect her of any moral wrong. One examiner who had the investigation in charge, in his special report, stated:

She seems to have guarded this secret well, as I could find no one who would admit that they had ever heard of her sustaining illicit relations with Mills or any other man. I made almost a house-to-house canvass of the entire neighborhood and interviewed at least thirty or forty persons who had known and been intimately acquainted with her for periods of from ten to thirty-five years without eliciting a single adverse fact as to her character or relations with men. I do not believe her admissions are susceptible of corroboration or that any adverse facts other than her own admissions can be shown.

Before another examiner, who met with the same failure as the last from whose report the above was taken, Albert L. Fields testified:

My age is 47 years past; a planter. * * * I have been living here since 1875. This claimant, Emily Claggett, has been residing on this place and in my employ more or less for more than twenty years; I should say twenty-five years. I am certain she was here as early as the beginning of the year 1882.

She was, as long as her health permitted, a hard-working woman, and until recently had a cabin in which she lived alone. She has never had any man living in the house with her. She has had no boarders or lodgers, and I have never seen anything derogatory to her character.

I have not seen anything of a suspicious nature about her house. I have never heard the other colored people on the place plaguing her about a sweetheart, and when a woman has such it is the habit of her friends to poke fun at her about the matter. She is now practically helpless, as the result of paralysis. She has no means of support, and is an object of charity.

The most that the evidence proves, therefore, is that this claimant, as shown by her admissions, has been guilty of fornication with one Mills, and, if her first confession is to be believed, with several other men.

The issue raised by this rejection and the appeal is therefore a simple one, and one not easily confused. Is proof of acts of clandestine sexual intercourse an offense which, under the provisions of the act of August 7, 1882, deprives or bars a soldier's widow from receiving a pension? The act referred to provides:

And the open and notorious adulterous cohabitation of a widow who is a pensioner shall operate to terminate her pension from the commencement of such cohabitation.

The offense named in this statute is a crime, and is so recognized by the statutes, in some form or other, of all of the States in the Union. The statutes of the different States and of the United States vary in the definition of the offense, but all are agreed that "open and notorious adulterous cohabitation" is a crime, and most States have enacted criminal laws against open and notorious fornication or cohabitation, and lewd and lascivious cohabitation or conduct; and all these statutes are based upon the idea that the crime outrages public decency and has a demoralizing influence upon society. In all of these enactments the gist of the offense is the notoriety caused by the act.

In the American and English Encyclopedia of Law (1st ed., v. 1, p. 212) it is said:

To constitute unlawful cohabitation, the living together must be open and notorious, as if the relation of husband and wife existed, and the illicit intercourse habitual.

The statutory crime can not be proved by a single act, or even by a number of acts of illicit intercourse. (*Miner v. People*, 58 Illinois, 59; *Granberry v. State*, 61 Mississippi, 440; *Richardson v. State*, 37 Texas, 346; *State v. Crouner*, 56 Missouri, 147; *Clowser v. Clapper*, 59 Indiana, 548; *Carotti v. State*, 42 Mississippi, 334.)

Even where an offense is committed that is not "adulterous," and where the proof shows there was no "cohabitation" in the sense of the parties living together in defiance of law (a recognized crime in some States), no conviction can be had unless the acts were such as to lead to a public scandal. It seems to be the universal doctrine that—

To constitute the offense of fornication the act must partake of the nature of public and offensive lewdness (*Am. and Eng. Ency. of Law*, v. 8, p. 556).

In Illinois (*Searles v. People*, 13 Illinois, 597) it was held that to constitute the crime of fornication the parties must dwell together openly and notoriously in illicit intimacy; in Iowa (*State v. Marvin*, 12 Iowa, 499) an indictment for lewd and lascivious conduct is not sustained by proof of two acts of private illicit intercourse; and in Massachusetts (*Commonwealth v. Calef*, 10 Massachusetts, 153) by "cohabiting" must be understood a dwelling or living together, and not a single act of criminal intercourse, the design of the statute in this provision being to prevent evil and indecent examples tending to corrupt the morals. Like decisions are found in the reports of all the courts, and all uphold the doctrine that the gist of the offense is in the immoral example, and that secret intimacy when not adulterous does not constitute a crime under enactments similar to the act of August 7, 1882.

It is thus seen that Congress in the enactment of August 7, 1882, provided a penalty for an offense long recognized as a crime, one that has been the subject of the decisions of many courts, and one that has in law a well-settled and well-defined meaning. It is a fundamental principle in construing statutes that words and phrases contained therein, unless shown to do violence to the plainly expressed intention

of the makers, should be given their ordinary legal meaning. Sutherland on Statutory Construction (ed. 1891, sec. 253) says:

Where a statute uses a word which is well known and has a definite sense at common law or in written law, it will be restricted to that sense unless it appears it was not so intended.

This is based upon the sound principle that where a word or phrase or a defined offense has been given by the courts or by common usage a definite meaning it must be presumed that the makers of the law had that meaning in view when the word, the phrase, or the defined offense was incorporated in the statute; and that presumption must prevail unless from the act itself it appears that a more restricted or different meaning was intended, and then such meaning will be given effect only where an ambiguity or doubt might readily arise. Where plainly expressed, unconflicting, and unequivocal words that do no violence to the intention of the makers as expressed by the act itself are used, they must be given their usual and ordinary meaning and can never be treated as surplusage, or, as stated by Sutherland (sec. 237):

It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power and seek for that intent in every legitimate way. But * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which the words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in construction.

The words "open and notorious," used in the statute under consideration, have a well-settled meaning both as to their ordinary and their legal use; and there is no warrant either in the well-settled rules construing statutes, in the decisions of the courts, or in the expressed intention of Congress to pervert or restrict their ordinary or legal meaning, or to consider them as mere surplusage. There is, therefore, no authority for holding that clandestine acts of fornication, where, after a thorough investigation, the only evidence obtained was the confession of the interested party, is a violation of the act of August 7, 1882. Such acts are not "open and notorious," and this is the gist of the offense.

By the foregoing the Department does not hold that the defined offense should be given its strict technical meaning—that is, that it should be construed strictly, as are criminal statutes. It has been held that the words "adulterous cohabitation" should be given their popular significance (Sarah J. Grooms, 7 P. D., 207; Matilda Agne, 9 P. D., 327; Alcie Gray, 7 P. D., 134; Rebecca Kilbee, 10 P. D., 286), thus carrying into effect the unquestioned intention of Congress, and, in common with the statutes of the various States, placing a ban upon

an offense which leads to public scandal, outrages society, and flouts in the face of the public indecency and immorality. In furtherance of public morals the statute should be and has been liberally construed; but this Department can not sanction a construction which fails to take into account words therein found, and which are clearly not contradictory to the purposes of the act as gathered by a careful consideration of the whole statute in connection with the written law of the land. The words "open and notorious" have a definite meaning, and that meaning must be given effect in the adjudication of cases under this act; and this has been the effect of the former decisions of the Department, though that may not have been the only or principal issue involved. In the case of Mary E. Boeke (1 P. D., 427), it was held that Congress intended that a widow who was guilty of "immoral and licentious acts of an open and adulterous character" should forfeit her pension; and in the case of Sarah J. Grooms (7 P. D., 207) the offense was defined as follows:

Open and notorious adulterous cohabitation of a widow, as contemplated by said act, may be proved by her conduct in habitually, openly, and notoriously consorting with one or more persons of the opposite sex under circumstances which would lead the guarded discretion of a reasonable and just man to infer from such relation, as a necessary conclusion, that it was illicit.

Nor does the Department hold that the confession of a claimant may not be sufficient evidence upon which to base adverse action. Numerous cases might and do arise where the confession of the claimant would show such a state of facts as would clearly be in violation of the act of August 7, 1882. Under such circumstances said confession would not only be sufficient upon which to base a rejection, but is the best evidence of her guilt that could be obtained. Care, however, should be exercised in such cases, and, where practicable, the signature to her deposition should be witnessed by persons not in the employ of the Bureau.

For reasons heretofore given, the action of rejection is reversed.

PATHOLOGICAL SEQUENCE—INSANITY—SUNSTROKE—RATE.

JOHN B. SHAFER (INSANE).

The existing insanity, first positively shown in 1883, was not a result of sunstroke, as alleged, which occurred in 1862. The present rate of pension is adequate for the pensioned disabilities.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, July 31, 1903.

John B. Shafer, an insane pensioner, served as a private in Company I, One hundred and twenty-third Ohio Volunteer Infantry, from

August 22, 1862, to May 5, 1863, when he was discharged on a surgeon's certificate of disability because of tuberculosis of right lung and endocarditis. His original declaration for pension was filed June 12, 1882, and he therein alleged that he was disabled by reason of disease of heart resulting from sunstroke and typhoid fever. On November 1, 1883, the soldier was judicially declared insane, and two days later he was admitted to the hospital for the insane at Anna, Ill., where he has been ever since confined, with the exception of a period of nearly two years, during which he was temporarily transferred to the hospital at Kankakee.

John C. Maxwell was appointed conservator of the soldier on June 9, 1884, and he continued the prosecution of the claim and held his conservatorship until quite recently.

When the original claim was adjudicated in September, 1887, after a special examination, the action of the legal reviewers was stated as follows:

Approved for sunstroke and typhoid fever and resulting disease of heart.

No other results legally shown. Head affection shown before enlistment.

The medical referee then approved the claim for "disease of heart, result of typhoid fever, and vertigo, result of sunstroke," and allowed a rate of \$8 per month.

Under a claim for increase filed February 1, 1888, the rate was increased to third grade (\$24 per month) from May 28, 1888. In his action allowing this increase the medical referee invited attention to the former legal action in regard to insanity.

The conservator filed another claim for increase September 13, 1889, asserting, in effect, that the soldier's insanity was a direct or indirect result of his military service. This claim was rejected in March, 1891, the legal reviewer stating that the alleged resulting insanity was not legally established.

Another claim for increase was filed July 12, 1897, and the same was rejected November 20, 1899.

On September 4, 1900, the conservator filed an appeal to the Department, contending that the soldier's insanity was due to his service, and requesting that the claim be thoroughly investigated.

When the papers were transmitted to the Department under date of July 29, 1902, it was stated that the evidence obtained by special examination tended to show a tendency in the soldier to an affection of the head (headache) prior to his enlistment. It appearing, however, that the question as to insanity being a result of the pensioned disabilities had not been properly considered and passed upon in the Pension Bureau, the Department, under date of September 24, 1902, returned the papers for further consideration and an additional report.

The papers were again transmitted to the Department July 7, 1903, with a statement that the claim had been duly considered and rejected.

It is now stated in the medical action that insanity is not accepted as a result of sunstroke, as alleged.

The records of the War Department show that the soldier was reported absent at home, sick, from October 13, 1862, to February 28, 1863; that subsequently he was reported absent, sick, at Columbus, Ohio. The medical records show him admitted to general hospital, Camp Chase, Ohio, March 26, 1863, and he was discharged May 5, 1863, as already shown. The diagnosis on first admission to said hospital was not stated, but it appears he was readmitted April 23 (having been reported as returned to duty the preceding day) with pericarditis.

It thus appears that the soldier became disabled within a short time after his enlistment and did not return to his command, although he evidently started for the front, but got no farther than Camp Chase and remained there until he was discharged.

The report from the War Department dated September 6, 1899, to the effect that the prisoner-of-war records show this soldier captured at Winchester, Va., June 15, 1863, and paroled at City Point, Va., July 14, 1863, is unexplained. The testimony shows that he did not reach his organization at any time after it started from Monroeville, Ohio, where it was organized.

John H. Carpenter testified that he enlisted in the same company with the soldier; that they were mustered in on the 24th of September, 1862; that about a week or two weeks afterwards, while on battalion drill at Monroeville, the soldier fell from his place in the company prone on the ground; that he was very positive the surgeon, Dr. Ferris, now deceased, called the trouble a sunstroke; that it took an hour or more to bring him to, and that he was under the surgeon's treatment for a long time afterwards. He further stated that he knew nothing of the soldier having had consumption or disease of heart; that he had not seen him since he became insane.

This is the only witness who testified positively as to the incurrence of sunstroke.

William Shafer, father of the soldier, testified that he went to see him when he was sick with typhoid fever at Monroeville, and took him home; that the soldier got better, and joined his regiment (but in this, as already indicated, he appears to have been mistaken); that he first noticed there was something wrong with the soldier some time after he came home from the Army—how long it was he could not say; that the soldier complained of his head hurting him and seemed changed, being cross and passionate at times; that he had no knowledge of the soldier complaining of heart disease at any time.

Dr. Alfred Force testified that he first met the soldier in the fall of 1862, when he was called to treat him at his father's house for a severe attack of typhoid fever, and learned that he had just come home from the military camp. The doctor further stated that he could not

remember that the attack of fever was complicated with anything else, or whether it had been preceded by a sunstroke. In concluding his deposition, the doctor said he then recalled that the soldier was weak, and complained a good deal of his head for months after he got about, from the fever.

Silas B. Resh testified that he knew the soldier as a boy; that he recalled that sometimes the soldier had headaches while at school and had to go home on account thereof; that, so far as he knew, the soldier was free from any disease at the time of his enlistment; that he knew the soldier was at his home sick with typhoid fever while the company was in camp at Monroeville and after it had moved forward; that after his discharge the soldier looked well enough, but complained of his head; that the soldier never exhibited any signs of insanity and was as clear-headed as anybody up to 1867, when he moved from Ohio.

There appears to have been no material difference in the complaint of headaches prior to service and afterwards.

In an affidavit executed August 29, 1883, Dr. P. P. Connett stated that the soldier applied to him in February, 1869, for treatment for severe pain in the frontal region of his head; that he treated him at different times thereafter for brain trouble and disease of lungs and kidneys. In another affidavit, executed in June, 1887, Dr. Connett stated that in the fall of 1875, commencing September 1, he treated the soldier for some weeks, and finally took the soldier with him to his home, where he improved nicely until November 1, when he was dismissed apparently well; that on the return of warm weather, however, brain trouble returned. When interviewed by a special examiner three months later, Dr. Connett stated that the first marked aberration of mind that he observed in the soldier was in August, 1875, although having seen evidences of brain trouble in his earlier treatment; that he did not recollect of treating him for heart disease or of examining him for that complaint.

Dr. W. B. Chambers stated in an affidavit executed September 29, 1883, that on October 30, 1882, the soldier called on him, complaining of severe pain in the head, and that since then he had treated him for lung and kidney troubles.

William L. Huestis testified that he knew the soldier since 1875; that they married sisters; that he first noticed something wrong with the soldier a short time after his marriage, when he was trying to prove to him that he had discovered perpetual motion; that the soldier had crazy or "off" spells about every month or so, which got worse and more frequent; that one of the soldier's peculiarities was imagining people were trying to harm him, and another was an undue jealousy of his wife; that he observed that the soldier showed violence when he was not allowed to have his way during the last two years before he was sent away; that the soldier had peculiar motions at times

about his head, and was treated for some complaint of his spine by Dr. Connett. The doctor, however, did not refer to such complaint in any of his statements.

Sarah F. Shafer, the wife of the soldier, testified that she became acquainted with him in 1873; that they were married in September, 1875; that she did not know there was anything wrong about him till about three months after their marriage; that he seemed unduly suspicious at times, accusing her of things that never happened, and imagined people were trying to injure him; that such spells would be about six months apart for a while; that the condition seemed to grow on him; that she noticed he was never able to stand labor in very hot weather, frequently stopping his work and coming into the house; that she heard he had something like sunstroke just before their marriage, on which occasion he was attended by Dr. Connett; that he complained of his heart a short time after their marriage and continued to do so from that time on; that the only other trouble she ever heard him complain of was his back; he said it hurt him at times. When again interviewed by a special examiner in January, 1903, she stated that she had never seen the soldier since he was sent to the asylum, in 1883. She was appointed conservator December 3, 1902, Mr. Maxwell having resigned.

The jury that adjudged the soldier insane November 1, 1883, stated as follows in their verdict:

We, * * * having heard the evidence in the case, are satisfied that said John B. Shafer is insane and a fit person to be sent to a State hospital for the insane; * * * that his age is 39 years; that his disease is of three years' duration; that the cause is unknown, probably sunstroke; that the disease is not with him hereditary; that he is not subject to epilepsy, and that he does not manifest homicidal tendencies. * * *

The records of the hospital at Anna, Ill., where the soldier was first confined, made at the time of his admission, show that he had attempted to shoot a man who, he said, had insulted his wife; that he had delusions that his wife was untrue to him and that parties wanted to kill him.

The first medical examination of the soldier in connection with his claim for pension was made July 26, 1882, about six weeks after the filing thereof, and more than three months prior to the time Dr. Chambers was called and found him complaining of a severe pain in his head. The report of the said examination is as follows:

I find heart sounds scarcely audible. Area of heart's dullness greatly increased. The pulsations can be seen some distance from applicant. Upper trunk and head in constant motion from each pulsation of heart. Complains of difficult breathing all the time.

Although sunstroke had been alleged and was included in the order for this examination, no probable effects thereof were described nor was there any suggestion that the soldier was not of sound mind at that time.

The next examination was made April 29, 1886, two years and a half after the soldier's commitment to the insane asylum. The report thereof states that the valvular sounds of the heart were muffled; that the radial pulse was easily compressed and irregularly intermittent after exercise; that the capillary circulation was sluggish; that the soldier was demented to some degree, visionary and foolish in his thoughts and efforts, and unable to apply himself to useful work; that he had, however, a very good memory of his early life and believed himself perfectly sound mentally. The examining surgeon expressed his opinion that the soldier's insanity was the result of gradual changes occurring in consequence of sunstroke and occasional effects of sun heat to which he had been subject since.

Two years later, May 28, 1888, at the time of the next examination, the examining surgeon reported that the soldier's statement was of no value, owing to his mental condition. The condition of the heart was alarming and it was stated that in the opinion of the physician in charge the soldier could not possibly live very long.

The next report, made in 1891, showed that the heart's action was fairly compensatory, the affection apparently having been greatly ameliorated; that the soldier was mildly demented and had no lucid intervals; that the form of insanity was chronic mania.

Similar conditions were described in the next report, March 23, 1899, when it was stated that the mental affection was chronic melancholia.

Another examination was made May 18, 1903, in connection with the further consideration of the case which was directed by the Department. Mitral regurgitation and marked hypertrophy of the heart are described, but there was no cyanosis, dyspnoea, or oedema. The examiner states that there is almost complete aberration of mind and that the soldier is unable to express an idea intelligently except things connected with his military service, thinking he is still in such service at times.

From the foregoing, which presents the material parts of the testimony, it is evident that the present rate of pension is adequate for the pensioned disabilities; that there were no marked symptoms of mental disorder until after the soldier's marriage in 1875, the exact date of which is not shown; that the evidence utterly fails to connect the existing insanity with the soldier's military service. There is not a particle of testimony to show that he manifested any symptoms of mental disorder during the period of about four years after his discharge while he remained in Ohio. Even at the time of filing his original declaration in June, 1882, the soldier appears to have been of sound mind; also, at the time of the first examination, as already indicated, and in October, 1882, and January and August, 1883, when he executed certain affidavits relating to this claim.

With the evidence presented to them at the time of the inquisition,

however, the jury stated that the attack of insanity was of three years' duration, carrying it back only to November, 1880. The evidence adduced in connection with the claim for pension would tend to show that the actual attack of insanity developed within about three months rather than that it was of three years' duration. The jury also stated in their verdict that the cause of the soldier's insanity was unknown, but probably sunstroke, which was merely conjecture. The evidence on file with the claim appears to show that insanity was sequential to more recent events and circumstances.

In considering the probability as to the cause of the soldier's insanity, it must be kept in mind that the alleged sunstroke was succeeded by an attack of typhoid fever, and also that insanity, although rare in both instances, is probably as frequently a sequence of typhoid fever as of sunstroke. In either event, however, when the various mental conditions which are classed as insanities are sequential to these or other affections, medical authorities show that they originate during the febrile stage or very soon thereafter, and rarely develop during later periods, limited to a few weeks or months. The opinion expressed by the examining surgeon in 1886, therefore, is not in accord with these authorities. Moreover, mania and melancholia, as described in this case, are excessively rare as results of either typhoid fever or sunstroke. Other forms of insanity are relatively more frequent, however, and they are usually temporary. Furthermore, mania and melancholia are generally considered as primary diseases of the nervous system.

Statistics relating to the causes of insanity show that, after the most careful inquiries, about one-fifth of the cases are classed as unknown.

After this careful consideration of all of the evidence now presented the Department is firmly of the opinion that the present insane condition of this soldier is not properly attributable to his military service. The adverse action appealed from and the recent action refusing to accept insanity as a result of sunstroke are therefore both affirmed.

INCREASE—ACT OF MARCH 19, 1886—WIDOWS.

MARY C. HERBERT (WIDOW).

The claimant not having married the sailor prior to the passage of the act of March 19, 1886, or prior to or during the service in which the disability causing death was contracted, she has no title to the \$12 per month provided for therein.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 31, 1903.*

Mary C., as widow of Thomas Herbert, formerly of the United States Navy, filed a claim for pension under the general law August 27, 1901, which was admitted December 14, 1901, at \$8 per month.

From the action of fixing the rate at \$8 per month the claimant, by her attorney, filed an appeal to the Department, contending that the claimant is entitled to \$12 per month under the provisions of the act of March 19, 1886.

The act approved March 19, 1886, reads as follows:

That from and after the passage of this act the rate of pension for widows, minor children, and dependent relatives now on the pension roll, or hereafter to be placed on the pension roll, and entitled to receive a less rate than hereinafter provided, shall be twelve dollars per month; and nothing herein shall be construed to affect the existing allowance of two dollars per month for each child under the age of sixteen years, provided that this act shall apply only to widows who were married to the deceased soldier or sailor prior to its passage and to those who may hereafter marry prior to or during the service of the soldier or sailor. And all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

In his argument counsel uses the following language:

The act of March 19, 1886, provides for two grades of widow's pension; giving the widow who married the soldier or sailor prior to or during his service the sum of \$12 per month and \$8 to the widow who married him subsequent to his service.

The act does not use the language as above set out. The words used are not "prior to or during his service" but are "prior to or during the service of the soldier or sailor." It is sought by the appellant in this case to give to the words "the service" the same meaning that would be given to the words "any service" of the soldier or sailor. "The" is a definite article, particularizing the subject spoken of. (Amer. and Eng. Ency. of Law, vol. 25, p. 1019.)

That the word "the" points out a particular service can readily be demonstrated in this case when it is considered that the sailor's service after his marriage to claimant conferred no pensionable title on her. He was not injured in that service nor did he contract any disease therein. So far as the evidence shows, his death was not caused mediately or immediately by his service after this claimant married him. If the subsequent service constituted all the service the sailor rendered the claimant would have had no title to pension under the general law. When the service was rendered that caused the sailor's death the claimant was not his wife.

The practice of the Bureau since the passage of the act of March 19, 1886, has been consistently in conformity with the following rule of practice, found in a Treatise of the Practice of the Pension Bureau, Governing the Adjudication of Army and Navy Pensions, approved April 9, 1898, page 59, paragraph 4:

Pensions to widows are graded according to the rank held by the soldier at the time the fatal disease was contracted. If the pensionable rank is below that of a commissioned officer, the rate is \$8 per month, prior to March 19, 1886, and \$12 from and after that date, provided she was married to the soldier or sailor prior to March 19, 1886, or was married to such soldier or sailor prior to or during his pensionable service.

The Department in the case of Eugenie M. Ferguson (387 L. B., 438), has rendered an opinion in a similar case, the said opinion being dated August 20, 1900, in which the following language was used:

It is contended by the appellant that as the sailor served more than four years subsequent to his marriage, the case is taken out of the exception to the benefits of the act of March 19, 1886. In other words, the argument is that as his marriage occurred prior to a portion of his service it should be considered to have occurred "prior to the service" within the meaning of the act.

The above opinion, which is here referred to and made a part of this opinion, fully sustained the Bureau in the practice above set out. It will thus be seen that from the date of the passage of the law it has been construed as the Bureau construed it in the case under consideration.

If there is any ambiguity in the law, if the language used by Congress is fairly open to more than one construction, that construction put upon it contemporaneously and adhered to for a long period of years should not be set aside for any light or transient cause.

So far as the act under consideration is concerned it would appear plainly that Congress could not have had in mind a succession of services when the law was framed. This claimant was granted only \$8 per month because her husband died of service causes, and her marriage to him took place after the passage of the act of March 19, 1886. If she had married a sailor whose only service was the years subsequent to her marriage she would have no title to pension under any law, he not dying from disability contracted in said service. This claimant would have received the \$8 per month she is now drawing if the sailor had never served subsequently to her marriage to him. Why should such subsequent service give her title to \$12 per month when the sailor received no disability therein and his death was not caused thereby?

In reason, which the law is, there can be no ground for contending any more strongly that the words "the service" mean any military or naval service than that they mean "the service in which disability was incurred." In so far the law is ambiguous and open to more than one construction.

A contemporaneous construction is that which a law receives soon after its enactment. This, after the lapse of time, without change of that construction by legislation or judicial decision, has generally been declared to be the best construction. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law. (Sutherland on Statutory Construction, par. 307.)

In Sutherland (*supra*), paragraph 309, the following appears:

Contemporary construction and official usage for a long period by the persons charged with the administration of the law are among the legitimate aids in the interpretation of statutes.

In *The United States v. Moore* (95 U. S., 760, 763), the Supreme Court held:

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. (*Edwards v. Darby*, 12 Wheat., 210; *United States v. The State Bank of North Carolina*, 6 Pet., 29; *United States v. MacDaniel*, 7 id., 1.)

This claimant's title to pension rests on the terms of the general law, which gives her a pension of \$8 per month because her marriage to the sailor took place after the passage of the act of March 19, 1886. It must be conceded that if the sailor had not served after claimant's marriage to him she could never have raised the question of her right to \$4 per month more. In reading a statute the subject-matter and general intent, once clearly ascertained, gives a key to all its intricacies; general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. (*Sutherland on Statutory Construction*, par. 218.)

In the *Eureka* case (4 Sawyer, 217, 302) Mr. Justice Field, of the United States Supreme Court, said:

Instances without number exist where the meaning of words in a statute has been enlarged or restricted or qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls.

Before the act of March 19, 1886, was approved all pensions to widows of private soldiers were \$8 per month, and their title to pension rested upon the terms of the general law; the act in question simply increased the rate of pension to all widows except those named in the proviso. It is manifest that Congress had no intention to increase the pension of a widow from \$8 to \$12 who married a sailor after the passage of the act, except the service rendered by him had some relation to his or the widow's title to pension. Mere service in the regular establishment in time of peace could not give any claimant title to pension. The general intent of the act was to pension a widow at \$12 per month whose husband died from service causes; that is, to pension a woman whose husband, by reason of his military service, became diseased and afterwards died from said disease, because she had lost her means of support through said service. No reason can be given for pensioning a woman at all whose husband was not disabled in the service. So in this case this claimant in reason can claim no benefit because of the service of her husband, which resulted in no disability.

The facts in the case under consideration are as follows:

The sailor enlisted in the United States Navy March 18, 1863, and was discharged October 13, 1890; reenlisted April 2, 1892, and was discharged April 1, 1898. He married the claimant March 28, 1892, and died August 14, 1901. The sailor filed a claim for pension under

the general law January 19, 1891, and on July 11, 1891, he was granted a pension of \$12 per month to date from date of filing, which he drew until March 4, 1892. On August 31, 1895, his name was dropped from the rolls, under section 4719, Revised Statutes, because of failure to claim pension for more than three years. April 6, 1898, he filed a claim for pension and was granted \$12 per month. He also filed a claim June 14, 1900, for increase, which was rejected May 6, 1901. The allowance of pension in 1899 was made under the following conditions:

Rate \$12 per month, commencing March 4, 1892, and \$30 from April 6, 1898; deduct time from April 2, 1892, to April 1, 1898, inclusive, period of subsequent naval service, and all payments since April 6, 1898, under the act of March 2, 1867, in lieu of certificate dated August 8, 1891, and subsequent issue; these pensions being for disability, viz, rheumatism and resulting disease of heart, under the general law and for twenty years' naval service under the act of March 2, 1867, section 4756, Revised Statutes.

It will be seen that when this claimant married the sailor he was a civilian and a pensioner, who reenlisted in the Navy a few days after the marriage. The medical records of the Navy Department fail to show that the sailor was treated for rheumatism or disease of heart at any time during his last service.

Under the circumstances in this case, and in view of the fact that the Bureau action from which the appeal was taken was fully in conformity to a practice obtaining from the date of the passage of the act, a practice sanctioned by the Department and fully sustained by the decision in the Ferguson case (*supra*), the same will not be disturbed, but is affirmed.

MARRIAGE—DIVORCE—UTAH—ACT JUNE 27, 1890.

MARY E. SMEDLEY (WIDOW).

The act of Congress approved June 23, 1874, conferred jurisdiction upon the probate courts of the Territory of Utah in divorce matters. The act of the Territorial legislature of Utah approved March 6, 1852, gave the probate courts of said Territory jurisdiction in divorce matters, and such act was in force August 10, 1876.

On said last-mentioned date the probate court of Boxelder County, Utah, issued a decree of divorce between claimant and the soldier herein, which divorce decree is valid upon its face.

Held: The said probate court having jurisdiction, and the decree being valid on its face, all statutory requirements and orders of the court having been strictly fulfilled, the claimant was regularly divorced from the soldier and is consequently not his widow.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, August 13, 1903.

Mary E., who alleges herself to be the widow of Francis J. Smedley, formerly a private in Company H, Forty-seventh Pennsylvania

Volunteer Infantry, filed her application under the act of June 27, 1890, on January 2, 1900, claim being rejected March 15, 1900, on the ground that she was not the widow of the soldier in question, he having been regularly divorced from her on August 10, 1876. An appeal was filed March 11, 1903, the following specifications of error being assigned:

1. In not finding that the decree of divorce obtained by the soldier dated August 10, 1876, was fraudulently procured.
2. In finding that the statute laws of Utah Territory had been complied with in procuring said divorce.
3. In finding that claimant acquiesced to said divorce during soldier's lifetime.
4. In finding that claimant received due notice of said divorce proceedings and failed to answer or demur thereto.
5. In not finding that the probate court granting the decree of said divorce had no jurisdiction of either the parties or the subject-matter and that the decree of divorce was void and a mere nullity.
6. In finding that the claimant was not the legal widow of the soldier and rejecting her claim.

The evidence in this case is as follows: Claimant, under the name of Mary E. Beck, married the soldier in the town of Marysville, State of Pennsylvania, on December 12, 1865, and lived and cohabited with him as his wife for a number of years thereafter. On August 10, 1876, the soldier procured a decree of divorce in Boxelder County, Territory of Utah. Claimant thereafter remarried, but asserts she abandoned her second husband upon being told the Utah divorce was void.

A transcript of the divorce proceedings is on file, and shows that Francis J. Smedley, on the 1st day of July, 1876, filed in the office of the probate court for Boxelder County, Territory of Utah, a libel for divorce against this claimant. On said 1st day of July the judge of said probate court, upon reading the affidavit of the libellant, issued a summons to Mary E. Smedley, commanding her to appear and answer the complaint already referred to, and the court, being advised that the libelee resided in the town of Marysville, State of Pennsylvania, ordered service of the said summons to be made upon said defendant by a publication thereof in the semiweekly Ogden Junction, published at Ogden, Utah, at least four times consecutively in forty days from July 1, 1876, and that a copy of said newspaper containing the first publication of said summons be mailed, post paid, to said libelee at Marysville, Pa. On August 10, 1876, the sheriff of said county filed an affidavit to the effect that the summons was published as directed and that he mailed a copy of the newspaper containing said publication, post paid, to the defendant at Marysville, Pa., said copy being mailed on the 12th day of July, 1876. Accompanying this affidavit

was the affidavit of Walter Thompson, who swore that he was principal clerk of the newspaper designated by the court and that the summons heretofore mentioned was published in said newspaper at least four times consecutively, commencing on the 12th day of July, 1876, and that he did, on July 12, 1876, deposit in the post-office, post paid, a copy of said newspaper containing a copy of said summons directed to Mary E. Smedley.

The following is a copy of the decree in said bill of divorce:

TERRITORY OF UTAH,
Boxelder County, ss:

Probate Court, special term, July 1, 1876. Hon. Samuel Smith, Judge.

Francis J. Smedley	} Petition for a divorce.
r.	
Mary E. Smedley.	

Petition filed July 1, 1876.

Summons issued July 1, 1876.

Order for publication July 1, 1876.

Affidavit of publication July 1, 1876.

Default entered August 10, 1876.

This cause coming on to be heard this 10th day of August, A. D. 1876, upon the complaint herein taken as confessed by the defendant, whose default for not answering has been duly entered and upon the proofs herein taken, from which it appears that all the material allegations of the complaint are sustained and that the matters so alleged and proved are sufficient to entitle the plaintiff to the relief prayed for in his complaint. On motion of counsel for the plaintiff it is ordered, adjudged, and decreed, and this court by virtue of the power and authority therein vested, and in pursuance of the statute in such cases made and provided, does order, adjudge, and decree that the marriage between the said plaintiff, Francis J. Smedley, and the said defendant, Mary E. Smedley, be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is free and absolutely released from the bonds of matrimony and all the obligations thereof.

SAMUEL SMITH, *Probate Judge.*

Paid in full.

(Recorded in Record "C" of probate, p. 7.)

As to the first specification of error. This is not the forum in which to try questions of fraud in matters of divorce. If this divorce was procured through fraud, the court which granted the decree of divorce is the proper court in which to raise such question. If the decree is valid, on its face, it is not for this Department to dispute its validity.

The third specification of error is without merit, for it is immaterial, so far as the present issue is concerned, whether claimant acquiesced or not in the decree.

If the claimant by specification No. 4 intends by "due notice" to mean actual personal notice, then this specification is without merit. Service by publication, if given strictly in accordance with the statute, is sufficient.

The Territory of Utah was created by act of Congress approved September 9, 1850, and section 9 of its organic act provided:

That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law.

No special jurisdiction was conferred upon the probate courts, and no mention is made in the organic act as to any tribunal having jurisdiction over divorce matters.

In an act of the Territorial legislature approved March 6, 1852, the following is found:

SECTION 1. *Be it enacted by the governor and legislative assembly of the Territory of Utah,* That the court of probate in the county where the plaintiff resides shall have jurisdiction in all cases of divorce and alimony, and of guardianship and distribution of property connected therewith.

SEC. 2. The petition for a bill of divorce must be made in writing, upon oath or affirmation, and must state clearly and specifically the causes on account of which the plaintiff seeks relief. If the court is satisfied that the person so applying is a resident of the Territory, or wishes to become one, and that the application is made in sincerity and of her own free will and choice and for the purposes set forth in the petition, then the court may decree a divorce from the bonds of matrimony against the husband for any of the following causes, to wit:

Impotency of the defendant at the time of marriage; adultery committed by defendant subsequent to marriage; wilful desertion of his wife by the defendant, or absenting himself without a reasonable cause for more than one year; habitual drunkenness of defendant subsequent to marriage; conviction of defendant for felony subsequent to marriage; inhuman treatment so as to endanger the life of the defendant's wife; when it shall be made to appear to the satisfaction and conviction of the court that the parties can not live in peace and union together and that their welfare requires a separation.

SEC. 3. The husband may in all cases obtain a divorce from his wife for the like causes and in the same manner as the wife obtains a divorce from her husband.

Under the above statute the probate courts of the Territory of Utah assumed jurisdiction in divorce cases, and decrees in such cases were constantly being rendered up to the year 1873. In said last-mentioned year Alice Cast procured a divorce from her husband, Eric, in the district court of the third judicial district of the Territory of Utah, and said Eric appealed to the supreme court of the Territory upon the ground that the district court had no jurisdiction in divorce cases, the legislature of the Territory having vested jurisdiction in the probate court, and thus inferentially depriving the district court of the jurisdiction which it might naturally have had save for the statute. This case was exhaustively discussed in *Cast v. Cast* (1 Utah, 112). This opinion was delivered in the October term of 1873, and decided: That the act conferring jurisdiction in divorce proceedings upon the probate courts did not, necessarily, deprive the district courts of such jurisdiction, notwithstanding the fact that no expressed jurisdiction was conferred on the district courts. The argument was exhaustive in the

premises and was as far as the supreme court needed to have gone, but it went further. It held that the act of the legislature, already quoted, so far as it conferred jurisdiction in divorce matters upon the probate court, was void for the reason that the Territorial legislature had no power, under the organic act, to confer such jurisdiction. It held that probate courts are inferior tribunals, and their jurisdiction can not be inferred, but must be given by positive law.

While the holding of the supreme court, so far as the jurisdiction of probate courts is concerned, was doubtless dictum—for no such issue was before the court at the time—yet were this final the Department would be inclined to accept such dictum as the law of the matter.

It appears, however, that Congress, in an act approved June 23, 1874, entitled "An act in relation to courts and judicial offices in the Territory of Utah," and in section 3 of said act, said:"

The district courts shall have exclusive original jurisdiction in all suits or proceedings in chancery, and in all actions at law in which the sum or value of the thing in controversy shall be three hundred dollars or upward. * * * Probate courts, in their respective counties, shall have jurisdiction in the settlement of the estates of decedents, and in matters of guardianship and other like matters; but otherwise they shall have no civil, chancery, or criminal jurisdiction whatever; they shall have jurisdiction of suits of divorce for statutory causes concurrently with the district courts; but any defendant in a suit for divorce commencing in a probate court shall be entitled, after appearance and before plea or answer, to have said suit removed to the district court having jurisdiction, when said suit shall proceed in like manner as if originally commenced in said district court. * * * And from the judgments of the probate courts an appeal shall lie to the district court of the district embracing the county in which such probate court is held in such cases and in such manner as the supreme court of said Territory may, by general rules, frame for that purpose, specify, and designate, and such appeal shall vacate the judgment appealed from, and the case shall be tried de novo in the appellate court.

The intent of this act of Congress, approved June 23, 1874, is so clearly apparent as not to require any extended discussion. It gave to the probate courts of the Territory of Utah, after said last-mentioned date, jurisdiction over divorce matters, concurrently with the district courts. It provided for a removal of the cause from the probate to the district court, under certain circumstances, and it also provided for an appeal from the decree of a probate court to the district court, under certain rules to be made by the supreme court of the Territory, in which event the case could be tried de novo by the district court.

When this act of Congress was approved the act of the Territory of Utah, of March 6, 1852, was in force, and it was adopted as a part of the compiled laws of the Territory of Utah under an act of the Territorial legislature approved February 18, 1876.

So far, then, as the fifth assignment of error is concerned it must be held that the probate court of Boxelder County, Territory of Utah, had jurisdiction over the divorce matter at issue when it rendered its decree of August 10, 1876.

One of the statutory grounds for a divorce is as follows:

When it shall be made to appear to the satisfaction and conviction of the court that the parties can not live in peace and union together, and that their welfare requires a separation.

A reference to the petition at issue shows that the petitioner pleaded the statute verbatim, and that thereupon the court took jurisdiction and made its regular orders therein. The last-known place of residence of the defendant having been made apparent by the affidavit of the petitioner, and it also appearing that she was a nonresident of the Territory of Utah, the court ordered service to be made upon her by publication, a copy of the newspaper containing the publication to be forwarded to the defendant at her last-known place of residence. All of the orders of the court were implicitly and technically fulfilled, and the decree of divorce is, upon its face, good and valid.

Under the act of August 7, 1882, the Department holds that the claimant herein is not the widow of the soldier through whom she claims pension, for the reason that he was divorced from her by a valid and regular decree August 10, 1876.

Action affirmed.

DISLOYALTY—EVIDENCE—SECTION 4716.

JAMES H. KELLEY.

The evidence fails to rebut the presumption, from the records of the War Department, of this soldier's voluntary aiding and abetting the rebellion.

He having died prior to the passage of the joint resolution of July 1, 1902, removing the bar of section 4716 as applied to the act of June 27, 1890, said joint resolution has no effect upon his claim under said act, and does not remove said bar existing at the time of his death so as to entitle his widow to accrued pension under said claim.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
August 13, 1903.*

This appellant, James H. Kelley (now deceased), was a member of Company M, Third Arkansas Cavalry, from January 28, 1864, to May 22, 1865, and on October 23, 1894, filed a claim, No. 678294, for pension under the act of June 27, 1890, which was rejected in September, 1896, on the ground of his prior voluntary service in the Confederate army, shown by the records of the War Department; and on October 16, 1901, he appealed, contending his Confederate service was not voluntary but conscripted.

Appellant died May 11, 1902, and his widow, Nancy Kelley, is now pensioned, certificate numbered 553356, under said act.

The records of the War Department show this soldier enlisted June 16, 1862, in the Confederate service for three years or the war; was

absent without leave from January 4, 1863, as shown on six months' muster roll, first on file, of February 28, 1863; deserted January 4, 1863, as shown on the roll of April 30, 1863; joined May 1, 1863, from desertion and detailed to niter works; and the last roll on file February 28, 1864, shows him still on that detail. There is no record of conscription, and the only evidence thereof is two general uncircumstantial affidavits, weak and inconclusive in their nature, and wholly insufficient to controvert the record, which tends to show a voluntary and not a conscripted service. The rejection of the appealed claim, therefore, is affirmed.

In your report herein of July 25, 1903, you call attention to your instructions of April 27, 1903, holding that—

The joint resolution (of July 1, 1902) does not, for purposes of accrued pension under the act of March 2, 1895, revive the pension of a former pensioner or make pending any claim of an applicant for pension who died prior to the passage of the joint resolution.

This question appears to have been indirectly passed upon in the cases of John Enfinger and Mary W. Craig (13 P. D., 248,259), distinguishing the case of Andrew J. Passons (8 P. D., 416), in which it was held that the act of August 1, 1892, removing in certain cases (as said joint resolution was held to have removed in other cases) the bar of section 4716 of the Revised Statutes, did not operate to revive, for the purpose of giving a widow accrued pension, a claim by her deceased husband who died prior to that act.

Under the laws existing at this soldier's death, any person who voluntarily aided or abetted the rebellion was not entitled to receive pension under the act of June 27, 1890; and this soldier's widow can have no greater right, as his successor under his claim, than he had thereunder at the time of his death. The legal bar to receipt of pension by such person was never, during this soldier's lifetime, removed by Congress, nor the existence of the fact constituting such bar disproven by him in this claim. His widow succeeds only to such rights as attached to his pensionable status under and by virtue of the laws existing at the time of his death. While the inhibition of section 4716 of the Revised Statutes was a bar to payment merely, as held in the cases of Enfinger and Craig, *supra*, the right to receive payment of pension is an element without which title to pension is incomplete. (See *Minors of John Gillespie*, 13 P. D., 280.) If the soldier did, in fact, voluntarily aid and abet the rebellion, he had, under the laws existing at the time of his death, no title to pension; and as pension is a personal gratuity, his pensionable status ended with his death. There was, therefore, no pensionable status of this soldier existing at the passage of said joint resolution which could be in any way affected by it. The status of his widow was her own, that of successor merely, to certain rights attaching, upon his death, to his status as fixed and

determined by the laws existing at his death. Her only right as such successor is to complete the proof in his pending claim under those laws and receive such pension, if any, as those laws gave him under that claim.

The joint resolution, therefore, has no application to the appealed claim, and there is no right to readjudication of said claim under said joint resolution.

RESTORATION—SECTION 4719—DROPPING.

ELIZA G. BROWN (WIDOW).

It is a satisfactory accounting, within the meaning of section 4719 of the Revised Statutes, of a pensioner's failure, for three years, to claim his pension, when it satisfactorily appears from the evidence that such pension had not legally terminated in some of the ways or for some of the causes specified, or by necessary implication included in the pension laws as terminating pension.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
August 13, 1903.*

This appellant, Eliza G. Brown, now pensioned, certificate number 523423, under the act of June 27, 1890, as widow of John G. Brown, formerly of Company H, One hundred and seventy-fifth New York Infantry, and deceased November 4, 1900, on December 14, 1901, filed a claim for restoration, under section 4719 of the Revised Statutes, of pension allowed him originally in 1866, certificate number 74125, and paid to September 4, 1885, from which date he failed to draw same, and three years later, accordingly, his name was dropped from the pension rolls, pursuant to the provisions of said section 4719.

Said claim was rejected in January, 1903, on the general ground, merely, that "under existing law she (claimant) is not entitled to any amount covering the period from the date of last payment to soldier to date of his death;" but on appeal rejection was reversed February 16, 1903, the Department holding that the widow of a soldier whose name was stricken from the rolls under section 4719 of the Revised Statutes has title to the arrears of pension thereunder upon proving continuance of his disability and satisfactorily accounting for his failure to draw his pension, as provided in said section; and the papers were returned for readjudication, under said section 4719, as to these facts upon which restoration is conditioned (13 P. D., 188).

In April, 1903, the claim was again rejected on the ground that "the pensioner having voluntarily surrendered and declined to receive his pension, and having persisted in such declination until his death, fifteen years afterwards, his name can not now be restored to the rolls and the back pension paid to his widow;" and on May 1, 1903, she

again appealed, contending merely that the latter rejection is a substantial duplicate of the first, and that it should likewise be reversed.

In transmitting the papers on this appeal the Commissioner of Pensions states the legal ground of the action now appealed from was not fully set forth, and that it should read, rejection is—

* * * on the ground that the pensioner having voluntarily surrendered and declined to receive his pension, and having persisted in such declination until his death, fifteen years afterwards, his name can not now be restored to the rolls and back pension paid to his widow, for the reason that the evidence now in the case, including that secured on special examination, is not accepted as "satisfactorily accounting for the failure to claim such pension," as required by section 4719 of the Revised Statutes.

The principal question herein is one of law—the legal construction to be given to the provision of said section 4719 that the soldier, the widow, or the child claiming under that section must accompany his or her application thereunder with "evidence satisfactorily accounting for the failure to claim such pension."

The Commissioner of Pensions holds that this provision confers upon him a discretionary power as to allowing such application, and that he may lawfully reject it for the reason stated, viz, that the pensioner herein had failed to claim his pension because he had voluntarily surrendered it and did not want it, believing he was not entitled to receive both it and his salary as a clerk in the Government employ, which he was during the entire period involved herein, and being nagged and twitted by his coemployees because of the fact he had been drawing both such pension and such salary.

This question was not considered or passed upon in the decision of February 16, 1903, herein, but was expressly waived in that decision, and the latter was confined to the general question only of the appellant's status to appeal under said section 4719.

By the specific terms of that section the failure of the pensioner for three years to draw his or her pension is made "presumptive evidence" of a certain fact, viz, that "such pension has legally terminated by reason of the pensioner's death, remarriage, recovery from the disability, or otherwise."

Said section in full reads as follows:

The failure of any pensioner to claim his pension for three years after the same shall have become due shall be deemed presumptive evidence that such pension has legally terminated by reason of the pensioner's death, remarriage, recovery from the disability, or otherwise, and the pensioner's name shall be stricken from the list of pensioners, subject to the right of restoration to the same on a new application by the pensioner, or, if the pensioner is dead, by the widow or minor children entitled to receive the accrued pension, accompanied by evidence satisfactorily accounting for the failure to claim such pension, and by medical evidence in cases of invalids who were not exempt from biennial examinations, as to the continuance of the disability.

The plain import of the provision that there must be evidence "satisfactorily accounting" for the failure to claim the pension is merely that such evidence must satisfactorily rebut such presumption that the pension had legally terminated in some of the ways specified. The statute does not say that the claimant must give a satisfactory explanation, but only that he must satisfactorily account for the failure to draw such pension; and the statute having made such failure the basis of a legal presumption that it was due to a certain fact, viz, the legal termination of the pension, it would seem to have been the clear intent of Congress that pension should be restored upon satisfactory rebuttal merely of said presumption by showing that no legal cause for termination of pension in fact existed.

Congress having thus explicitly confined said presumption not only to one certain fact, viz, the legal termination of the pension, but also to one certain kind or class of causes for legal termination thereof, all other facts which might be presumed from the failure to claim pension, and all other kinds or classes of causes which might, on legal or equitable grounds, be held to terminate pension, are, by inference, excluded and may not be considered in adjudicating an application under said section. The doctrine *expressio unius est exclusio alterius* applies. (Sutherland on Stat. Constr., sec. 325, et seq.)

As to what causes are included within the term "or otherwise," it is a well-settled doctrine, says the same authority (section 272), that in construing statutes, particularly those requiring a strict construction, a general description following a specific enumeration of objects or things will be held to include only such as are of the same kind as those specifically enumerated, citing many illustrations of this doctrine and authorities therefor.

This term in section 4719, therefore, must be limited to causes of the same kind as those enumerated therein, viz, to those causes only which the pension law specifically or by necessary implication makes ground, *ipso facto*, for termination of pension, such as, besides those named, adulterous cohabitation, reenlistment, etc.; and upon it satisfactorily appearing that no such cause in fact existed as the reason for the failure to claim the pension, the latter should be restored, without regard to the nature of such reason otherwise, or as to whether it might, under the rules of law or those of equity, be ground for termination of the pension.

Even in law and equity mere abandonment or mere waiver does not affect the legal title in the thing abandoned or waived, but such title is generally lost only when the rights of third parties become involved. (1 Am. and Eng. Encyc. of Law, p. 2, n; 28 id., p. 531, n; Bigelow on Estoppel, p. 508.) No third party's rights being involved in a pensioner's abandonment or waiver of his pension, such abandonment or waiver would not be legally binding upon him so as to estop or debar

him from retracting it and resuming his pension if he should see fit to do so.

Nor could such abandonment or waiver by a pensioner have any more binding effect upon the one entitled under the statute to claim such pension after his death when he shall have died without himself reclaiming it; for there is no privity between such deceased pensioner and such one entitled to claim, after the pensioner's death, this unpaid pension. Each derives, directly from the statute, a separate and distinct right as to such pension; and for this reason it is believed it was not within the contemplation of Congress in enacting said section 4719 that a pensioner might make a valid and binding gift to the Government of his pension (which the Commissioner of Pensions contends he can, and that this pensioner did do), so as to foreclose the right of the one thus entitled under said section after the pensioner's death to claim such pension.

Whatever the pensioner might do by abandonment, waiver, or gift of his pension to bind himself, his action can not, under this statute, bind the one entitled thereunder also to claim and receive the pension which he failed to claim or receive, there being, as stated, no privity between them. Such one takes as himself or herself a direct and immediate beneficiary under the law and not as the pensioner's representative.

No argument can be drawn from the fact that the pension was a personal gratuity to the pensioner. It is likewise a personal gratuity, under this section of the law, to the one entitled after the pensioner's death to receive it, and the latter's right is as legal in all respects as the former's, and is wholly independent of the former's right of reclamation.

If it be held that a pensioner may by gift to the Government of his pension thus debar the one entitled to his accrued pension from claiming under this statute after his death, it makes this grant to the latter ineffectual and defeats it wholly. Such a result is to be avoided if possible.

Parts of a statute "are to be brought into harmony, if possible, and so construed that no clause, sentence, or word shall be void, superfluous, or insignificant" (Sutherland on Stat. Constr., sec. 240), and the United States Supreme Court has held (*Walton v. Cotton*, 19 How., 355) that Congress in its pension legislation will be presumed to have acted under the ordinary influences which lead to an equitable and not a capricious result, and where the language used may be so construed as to carry out a benign policy, within the reasonable intent of Congress, it should be done.

A strict rather than a liberal construction of said section would appear, on general principles of law, to be proper, as it is a statute in partial limitation or in derogation of an established right under an existing law. It is true a pension is not a "vested right" in the usual

sense of that term, and Congress may recall or destroy the right at its pleasure. (*Teller v. United States*, 107 U. S., 64.) It is also true that Congress has hedged its allowance and receipt with many conditions and limitations, and that it is a statutory grant, to be construed strictly, and those only who are clearly within the purview of the grant held to be entitled to receive its benefits. See *Sutherland*, *supra*, sections 398, 399.

In *Emma J. Hallett* (13 P. D., 31) the Department stated:

* * * The rule announced by Mr. Chief Justice Fuller in *Wisconsin Central Railroad v. United States* (164 U. S., 190), "That statutes granting privileges * * * are to be strictly construed against the grantee" is in point. This rule applies to the construction of pension laws in ascertaining the class of beneficiaries intended to be included in the language of the law, but when this fact is clearly ascertained, or plainly designated in the law, then a liberal construction follows in conferring the benefit of the law upon the persons designated. See *Harvey Bowles* (10 P. D., 133); *John S. Williams* (*ibid.*, 169); *John H. Meeker* (*ibid.*, 182).

The Government has maintained from its inception a liberal pension policy; invalid pensions * * * belong to (its) subsisting military system (7 Op. Atty. Gen., 717), and its pension legislation is to be construed so as to effectuate a benign policy as to pensions (*Walton v. Cotton*, *supra*).

When once placed on the pension roll the pensioner acquires "a legal claim to a semiannual (now quarterly) payment of a certain sum of money" (4 Op. Atty. Gen., 366). The right to pension then becomes "fixed" or "vested" under the pension law (*Daily v. United States*, 17 Ct. Cl., 144; *Semple v. United States*, 24 Ct. Cl., 422); and the pension certificate is *prima facie* evidence of legal title to pension (*Alexander v. United States*, 4 Ct. Cl., 218; *Donnelly v. United States*, 17 Ct. Cl., 105; also *minors of John Gillespie*, 13 P. D., 280; *Mary Nicholas*, as widow of *Francis Wallace*, *ibid.*, 286). The act of December 21, 1893, has declared that the right to the pension, on issuance of a certificate, shall be so far a vested right that certain notice and hearing must be first given before payment of such pension may be stopped. And the Iowa supreme court has held that the right to pension is such a property right, so long as the statute authorizing such pension remains in force, as will entitle a former wife of a deceased pensioner who, as his widow, would be entitled to pension, to sue to set aside a decree of divorce fraudulently obtained by him (*Lawrence v. Nelson*, 85 N. W. Rep., 84).

Said section 4719, therefore, is in the nature of a statute of limitation upon this legal right to pension, existing by reason of and evidenced by the certificate thereof; and such statutes and statutes of forfeiture or in derogation of established rights or policies or settled courses of legislation are, as a rule, construed strictly (*Endlich on Interpretation of Statutes*, secs. 127, 340; *Sutherland*, *supra*, sec. 368).

It is noted that the law contained in said section 4719 does not raise any presumption as to the legality of the pensioner's title under and

as evidenced by his certificate, which is prima facie evidence of all the facts necessary to the allowance of pension (see *Alexander v. United States*, supra); but it raises a presumption only as to continuance of such title at and from the date of last payment. The presumption of legality as to original title to pension remains unimpaired and unaffected, and it is this legal title which Congress has evidently recognized and sought to conserve by giving it a qualified and limited vested nature, so as to secure the pension thereunder to one or the other of the specified beneficiaries, provided only that there has or had not been a legal termination of the right to pension in some of the ways specified in the pension laws.

It is therefore held that there is a satisfactory accounting, within the meaning of said section, of the failure of a pensioner for three years to claim his pension when it satisfactorily appears in evidence that his right to pension had not legally terminated in some of said ways, and that title to restoration under that section is prima facie established (except as to proof of continuance of disability) upon such rebuttal of the presumption, raised under said section by such failure to claim the pension, that the right thereto had legally terminated, it being then, as always, however, within the power and province of the Commissioner of Pensions and of the Department to investigate as to the merits of the original title, should either see fit to do so, to ascertain whether pension was properly allowable originally, for the certificate of pension is, as stated, only prima facie evidence of title and of the facts necessary to the allowance of the pension.

The decision of the Department in the case of Mark G. Campbell (8 P. D., 203), in so far as it may conflict with the holding in this case, is hereby overruled.

The rejection of this claim is reversed, and you will readjudicate it in accordance with the foregoing views.

RESTORATION—ACT MARCH 3, 1901—DIVORCE.

EMALINE S. LAMB, FORMERLY GRISWOLD (WIDOW).

The act of March 3, 1901, does not relate to the divorce from any other than the husband on account of whom a widow's pension was terminated.

Claimant having been legally divorced, on her own application and without fault on her part, from Artemus Bennett, on account of her marriage to whom her pension was terminated, she is entitled to be restored to the pension rolls, under the provision of said act.

Assistant Secretary M. W. Miller to the Commissioner of Pensions,
August 13, 1903.

Emaline S. Lamb, formerly the widow of Alonzo Griswold, late private in Company K, Fourteenth Connecticut Volunteer Infantry, filed a claim for restoration of a widow's pension under the act of March 3, 1901, on April 15, 1901, which claim was rejected February

12, 1902, on the ground that claimant was not divorced from her third husband, Warren, upon her own application and without fault on her part.

From this action she appealed March 8, 1902, contending that the act of March 3, 1901, relates only to the husband on whose account her name was dropped from the pension rolls and not to any subsequent marriage.

Claimant filed an affidavit October 14, 1901, in which she made the following allegations:

That her pension was terminated April 14, 1866, through her marriage to Artemus Bennett, being continued to the minor child of soldier until said child reached the age of 16 years; that said marriage to Bennett was terminated in September, 1867, by divorce on her application; that she was again married, July 8, 1869, to Myron L. Warren, from whom she was divorced the following year; that on the 29th of April, 1871, she was married to Lorenzo R. Lamb, with whom she lived until his death, December 8, 1893; that since the death of said Lorenzo R. Lamb she has remained a widow, and that she is not in receipt of any pension from the United States.

A certified copy of the decree of the superior court of Tolland County, Conn., at the September, 1868, term thereof, in the case of Emaline S. Bennett *v.* Artemus Bennett, was filed in the case. It is as follows:

Emeline S. Bennett, of Somers, petitioner; Artemus Bennett, of Ellington, respondent.

Upon the petition of Emeline S. Bennett, of Somers, showing that on or about the 14th day of September, A. D. 1866, she was lawfully married to Artemus Bennett, of Ellington, in said Tolland County, with whom the petitioner lived in the performance of all the duties of the marriage covenant on her part to be performed until on or about the 22d day of December, 1867, when the said respondent willfully deserted the petitioner, and has continued said desertion, with total neglect of all the duties of the marriage covenant on his part to be performed, from thence hitherto. And, further, showing the said respondent for a period of more than one year last past has been and now is habitually intemperate.

Praying for a divorce and for a change of petitioner's name as, by petitions on file dated the 10th day of August, A. D. 1863, more fully appears, this petition came to the present term of this court. The court finds that said petition has been fully served on the respondent, as appears by the officer's return thereon indorsed. And now the petitioner appeared to prosecute said petition and the respondent appeared not. Whereupon, the allegations in said petition having been proved and found true, it is adjudged, ordered, and decreed by this court that the said Emeline S. Bennett be and she is hereby divorced from the said Artemus Bennett and be discharged from all the duties and covenants to him by reason of the marriage aforesaid. And the said Emeline S. Bennett, is hereby declared to be single and unmarried.

And the name of said petitioner is hereby ordered and decreed to be changed to that of Emeline S. Griswold, by which name she shall be hereafter known and called.

By order of the court.

The language of the act of March 3, 1901, is plain and unmistakable wherein it refers to restoration of a widow to the pension rolls whose pension was terminated by her remarriage. It is as follows:

* * * Whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person who has since died or shall here-

after die, or from whom she has been heretofore or shall be hereafter divorced, upon her own application and without fault on her part, and if she is without means of support other than her daily labor, as defined by the acts of June 27, 1890, and May 9, 1900, shall be entitled to have her name again placed on the pension roll. * * *

It is contended that the above act relates solely to the husband on whose account the widow's name was dropped from the pension rolls, and to no other or subsequent husband, and with this contention the Department is inclined to agree.

The language of the act above referred to is plain, certain, and unmistakable, and one needs no rules of interpretation to determine its meaning. In Sutherland on Statutory Construction (sec. 234) the author says:

That if a statute is plain, certain, and unambiguous, so that no doubt arises from its terms as to its scope and meaning, a bare reading suffices; then interpretation is needless. * * * The rules of construction with which the books abound apply only where the words used are of doubtful import. Courts are not at liberty to speculate upon the intention of the legislature where the words are clear, and to construe an act upon their own notions of what ought to have been enacted.

The act plainly and distinctly says that a widow whose name has been dropped from the pension rolls by reason of her marriage to another person, from whom she has been heretofore or shall be hereafter divorced, upon her own application and without fault on her part, shall be restored to the pension rolls from the date of filing her application.

The meaning of this statute is clear, and its provisions are susceptible of but one interpretation; and the Department has no authority to depart from the plain meaning of the language of the act, which is free from ambiguity.

The evidence shows that claimant's husband died in the service in 1864, and that she remained a widow and was pensioned until September 14, 1866, when she married Artemus Bennett; that she obtained a divorce from said Bennett in September, 1868, on her own application and without fault on her part. The divorce was granted on the ground of the intemperate habits and desertion on the part of said Bennett.

Claimant married her third husband, Myron Warren, in 1870, and lived with him but a short time when said Warren obtained a divorce on the ground of adultery committed by claimant. It was because of this divorce not having been obtained on claimant's application and without fault on her part that the Bureau refused to restore her name to the pension rolls.

The issue raised by the appeal is whether or not the act of March 3, 1901, relates to the manner of being divorced from a person, other than the one on account of whom her pension was terminated. From the language of the statute it was clearly the intention of the Congress to restore to the rolls any widow who had been dropped by reason of her remarriage to another person, if she was divorced from that per-

son on her own application and without fault on her part. The act clearly means that a widow may be restored to the rolls if she procures a divorce from the person on account of whom she was dropped, on her own application, and without fault on her part. It is not believed that a subsequent marriage and divorce, when claimant had ceased to be a pensioner, affects her pensionable status, under the act above referred to.

Congress evidently did not contemplate a succession of marriages by a widow pensioner.

Claimant's name was dropped from the rolls on account of her marriage to Artemus Bennett. The county records show that she obtained a divorce from said Bennett on her own application and without fault on her part, which, it is believed, fulfills all the requirements of the act of March 3, 1901. Her subsequent marriage to and divorce from Myron Warren does not, in the opinion of the Department, affect her pensionable status, for she was not a pensioner at the time of her marriage to Warren, and it was not on account of her marriage to him that her name was dropped from the rolls.

So far as shown by the evidence in the case, claimant has been living the life of a good moral woman since her remarriage to Lorenzo R. Lamb, in 1871.

The Department is of the opinion that said act relates only to the husband on account of her marriage to whom claimant's name was dropped from the rolls, and not to any other or subsequent husband; and she having been divorced from said Bennett agreeably to the provisions of said act, she is entitled to restoration to the pension rolls from the date of filing her application.

The action appealed from is reversed, and the papers are returned for a readjudication of the claim in conformity with this opinion.

LINE OF DUTY—ABSENCE FROM COMMAND—SECTION 4702, R. S.

MINOR OF ANTHONY J. BRECHBIEL.

It appearing from the evidence in this case that at the time this soldier lost his life by drowning he was absent from his command on a pass, attending a picnic party for his own pleasure and amusement, he was not in "line of duty" within the meaning and intent of those words as used in the pension laws, and his death under such circumstances confers no title to pension upon his minor child under the provisions of section 4702, Revised Statutes, and the decisions of this Department.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 13, 1903.*

Annie L. Brick filed in the Pension Bureau on June 15, 1899, an application for pension under the provisions of section 4702, Revised

Statutes, as guardian for and in behalf of Annie Brechbiel as minor child of Anthony J. Brechbiel, late a sergeant in Company E, Battalion United States Engineers, alleging the death of said soldier and father of said minor on July 4, 1897, by accidental drowning while in service and in line of duty; the remarriage of the widow of said soldier on May 7, 1899, and that at the date of said remarriage said minor was under the age of 16 years.

This application for minor's pension was rejected April 27, 1900, upon the ground that the death of the soldier was not in line of military duty, he being absent from his command by permission for his own pleasure and amusement at the time he was drowned.

From this action the present appeal was taken on February 27, 1902.

The evidence shows that the soldier was married to the mother of said minor on September 19, 1892, and that he lived with her as his wife until his death, and that said minor was born of said marriage on August 27, 1894. It also appears from the papers that the widow of the soldier and mother of the minor was pensioned under the provisions of section 4702, Revised Statutes, in her own right until her remarriage, and that she was afterwards duly and regularly appointed as guardian of the minor on June 6, 1899, and filed the present claim for the continuance of the pension to the minor as above set forth.

The official military records of the War Department show that the deceased soldier served in the above-named organization from December 24, 1883, until his death, on July 4, 1897, and that during the whole of said period his company was stationed at West Point, N. Y., as part of the garrison of that military post.

The circumstances under which the soldier met his death by drowning fully appear from a report made by the commander of his company to the War Department of the accident, as follows:

Under date of August 6, 1897, Capt. James L. Lusk, Corps of Engineers, commanding Company E, reported as follows: "On the afternoon of July 4, 1897, there was a small picnic party at Long Pond, which is situated about 5 miles from West Point. The following enlisted men were among those present: Company E, Battalion of Engineers, Sergt. Anthony Brechbiel (and others); a number of women and children also belonged to the party. It appears that Corporal Meisle, Mrs. Michel and infant daughter, and Mrs. Holtz went out in a small skiff. When a short distance from shore the boat capsized, throwing the occupants into the water. None of them except Corporal Meisle could swim, and Sergeant Brechbiel, who at the time of the capsizing was on shore, rushed into the pond to assist in saving the four people struggling in the water. While in the act of bringing the child to shore he was grasped by Mrs. Michel, who was a very heavy woman, and the three, Sergeant Brechbiel, Mrs. Michel, and the child, were drowned. Mrs. Holtz in the meantime had been saved by the exertions of Corporal Meisle and Musician Renand. Sergeant Brechbiel was absent with permission on July 4, 1897, and it is believed that Sergeant Brechbiel's death occurred in the line of duty."

The muster roll of the soldier's company for July and August, 1897, shows him—

Died by drowning at Long Pond, Orange County, N. Y., July 4, 1897, while attempting to save the lives of others.

It appears from the papers that subsequent to the taking of the present appeal, and while the claim was awaiting consideration by this Department thereunder, it was again considered in the Pension Bureau, and on April 10, 1902, the Commissioner of Pensions transmitted the papers to the Adjutant-General of the Army, with the request that, in view of the fact that the soldier was drowned at a time when on leave of absence, and presumably while performing no military duty, an official determination by the War Department be made of the question as to whether the soldier's death, under the circumstances shown in this case, occurred in line of duty.

On April 15, 1902, the Adjutant-General referred the case, with the accompanying papers, to the Judge-Advocate-General of the Army for his opinion upon the question of line of duty, who, on April 19, 1902, rendered the following opinion:

Respectfully returned to the Adjutant-General.

The facts of this case are stated as follows: "On the afternoon of July 4, 1897, there was a small picnic party at Long Pond, which is situated about 5 miles from West Point. The following enlisted men were among those present: Company E, Battalion of Engineers, Sergt. Anthony Brechbiel (and others). A number of women and children also belonged to the party. It appears that Corporal Meisle, Mrs. Michel and infant daughter, and Mrs. Holtz went out in a small skiff. When a short distance from shore the boat capsized, throwing the occupants into the water. None of them except Corporal Meisle could swim, and Sergeant Brechbiel, who at the time of the capsizing was on shore, rushed into the pond to assist in saving the four people struggling in the water. While in the act of bringing the child to shore he was grasped by Mrs. Michel, who was a very heavy woman, and the three, Sergeant Brechbiel, Mrs. Michel, and the child, were drowned. Mrs. Holtz, in the meantime, had been saved by the exertions of Corporal Meisle and Musician Renand. Sergeant Brechbiel was absent with permission on July 4, 1897."

The opinion of this office is desired as to whether this soldier's death occurred in line of duty.

In one sense every injury received by a soldier, except one received while he is doing what no soldier may lawfully do, is incurred in line of duty; but the true test in cases of this character is whether the injury complained of was due to the performance of military duty.

There is a duty which flows from our membership in society, and there is another duty which arises from the vocation we follow. If a soldier loses his life in the performance of the obligations arising from his profession, he is said to have died in line of duty, i. e., in line of his military duty; but not so if he dies in the performance of acts arising from his duty as a member of society. Two cases involving the same set of circumstances may call for different decisions, depending upon the vocations of the individuals. For illustration: A member of the Life-Saving Service dying under the circumstances of the case in question would, doubtless, be said to have died in line of duty; but a member of the Life-Saving Service losing his life in an effort to rescue a man in battle could not be said to have died in the line of his duty as a member of the Life-Saving Service; while a soldier losing his life under the latter circumstances would meet death in the line of his duty as a soldier.

Sergeant Brechbiel's effort to save the life of others was highly creditable and showed a deep appreciation of that civic duty which rests upon us all as members of society; but his death was not due to the performance of any obligations resting upon him by virtue of his profession as a soldier.

I am therefore of the opinion that the question asked should be answered in the negative.

On April 30, 1902, the foregoing opinion of the Judge-Advocate-General was submitted by the Adjutant-General to the Assistant Secretary of War, by whom it was approved, and on May 3, 1902, transmitted to the Commissioner of Pensions with the following communication:

I have the honor to return herewith the papers in the case of Sergt. Anthony Brechbiel, and to invite your attention to the opinion of the Judge-Advocate-General which is concurred in by this Department.

I need not assure you that the Department regrets that the heroic action of Sergeant Brechbiel in endeavoring to save life should, under the necessary construction of the law, be held not in the line of duty, as the Department would be only too pleased to have every possible recognition of this splendid act of gallantry and self-sacrifice made by the Pension Department or any other department of the Government.

In view of the opinion of the Judge-Advocate-General and the holding of the War Department approving the same and concurring therein, the Pension Bureau on May 8, 1902, adhered to the rejection of this claim of the minor upon the same grounds.

The foregoing opinion of the Judge-Advocate-General of the Army in this case is exactly in accord with the decisions of this Department on the question of line of duty, which have been consistent and unvarying almost from the time of the foundation of the Department in holding that a soldier is not in line of duty within the meaning of the pension laws when he is absent from his command on leave, or on a pass in pursuit of pleasure, or to attend to private business, and a disability contracted, or accidental injury incurred while so absent beyond the lines of his command is not pensionable; and death occurring under such circumstances confers no pensionable title upon his widow or his minor children under the provisions of the pension laws. Roslinda McCabe (Harlan, Secretary), 5 L. B. P., 273; Robert Newman (Schurz, Secretary), 6 P. D. (o. s.), 228; Benjamin F. Worrell (Schurz, Secretary), *ibid*, 309; Benjamin W. Seaman (Kirkwood, Secretary), 9 P. D. (o. s.), 8; Elizabeth Brogunier (Teller, Secretary), *ibid*, 250.

In the case last cited the facts were almost identical with those in the case at present under consideration. The soldier was accidentally drowned in the Potomac River while returning from a supper party outside of the line of the camp of his command, which he had attended by permission of his commanding officer. It was held by the Department that his widow was not entitled to pension, for the reason that he was not, at the time of the accident which caused his death, engaged in any military duty, but was absent from his command for a purpose not in any manner connected with his duty as a soldier.

John Pruitt (Teller, Secretary), 9 P. D. (o. s.), 295; William H. Cummings (Hawkins, Asst. Sec.), 1 P. D., 351; John Yant (Hawkins, Asst. Sec.), *ibid*, 118; Sarah Croft (Hawkins, Asst. Sec.), *ibid*, 279; Susan Stevenson (Bussey, Asst. Sec.), 3 P. D., 171; Anna S. Kranse (Bussey, Asst. Sec.), *ibid*, 243; Catherine Ott (Bussey, Asst. Sec.), 4 P. D., 47; James E. Harrison (Reynolds, Asst. Sec.), 7 P. D., 97; Willard Spinney (Reynolds, Asst. Sec.), *ibid*, 335. In this case the Department held:

The phrase "line of duty" in the pension laws is held and has always been held to refer exclusively to military duty and not civic duty, or to the moral obligations which rest upon all men alike without regard to their profession, calling, or official status.

Daniel V. Milvin (Reynolds, Asst. Sec.), 8 P. D., 89; George E. Wykoff (Davis, Asst. Sec.), 9 P. D., 52; Henry A. Helmer (Davis, Asst. Sec.), *ibid*, 130. In this case the Department said:

It is perfectly legitimate and proper for a soldier to do many things while in the service that are not within the line of his military duty in the sense contemplated by the law relating to pensions.

James E. Harrison (Davis, Asst. Sec.), 9 P. D., 433; Mary E. Parker (Campbell, Asst. Sec.), 11 P. D., 103; James D. Silman (Campbell, Asst. Sec.), 12 P. D., 431; Robert A. Smith (Campbell, Asst. Sec.), *ibid*, 141.

It is very evident from the foregoing long line of departmental decisions construing the pension laws with reference to line of duty that however commendable and heroic the conduct of the deceased soldier may have been in risking and losing his life in the effort to save the lives of others, it had no conceivable relation to or connection with his military duty under the circumstances of this case, and could not possibly give title to pension to his minor child or to his widow under the provisions of the pension laws.

The cases of Henry Newman, 8 P. D., 532; Lindey Ruddick, 10 P. D., 217, and the minor child of James F. Marsteller, 11 P. D., 55, are cited and urged by the appellant in support of her contention that the soldier was in line of duty within the meaning of the pension laws at the time of his death, but these cases are widely different from the one at present under consideration and were decided upon an entirely different principle. In the first two cases the injuries for which the soldiers were pensioned were received while they were engaged in camp in athletic sports and were shown not to have been the result of any wrongful or improper conduct on their part or of violation of any rule or regulation of the military service. Such athletic sports, when properly conducted, have always been encouraged by the military authorities as tending to the health, amusement, and contentment of the soldiers when in camp or garrison, and for this reason those engaged therein under such circumstances have been held to be in the

line of military duty. In the Marsteller case the father of the minor was an officer of the Regular Army stationed at a western military post, and was accidentally killed while hunting by permission of his commanding officer. He was held to have lost his life in line of duty, and his minor child to be pensionable under the provisions of the general law, for the reason, as was clearly stated in the decision in said case, that under the regulations of the War Department the officers and soldiers of the Regular Army stationed at military posts in the States and Territories of the Far West were not only permitted but encouraged and urged to engage in hunting, and while so engaged were held by the military authorities to be on a sort of, or quasi, special service, and were considered and held by the War Department to be in line of military duty. The reason for this holding was stated to be that hunting under such circumstances not only aided in promoting the health and contentment of the garrison of the post, but afforded a means by which the food supply of the garrison could be, and was, both augmented and varied. It is easily seen that there is no parallel whatever between these last-cited cases and the present claim, and that they were decided upon grounds and for reasons which are not presented by the facts in this case and have no bearing whatever.

It is most earnestly urged by the appellant that inasmuch as the mother of this minor was granted and paid a pension by the Pension Bureau on the same state of facts, the death of the soldier must have been accepted as having occurred in line of duty, and that this question is thus *res adjudicata* in this case. It is true that the widow of the soldier was granted a pension as alleged, and it is most unfortunate that this should have been done. It is equally as true, however, that the allowance of a pension to the widow in this case was a gross and palpable error, and such action was taken in defiance of the law and of the long line of rulings of this Department herein cited. The allowance of the widow's claim was not, however, such a final and complete determination of the questions involved as would amount in any sense to *res adjudicata*, or which would preclude the Pension Bureau or this Department from correcting the error thereby committed at any time when the same was called to the attention of the Commissioner of Pensions or of this Department. It is true that in certain cases where the question involved was simply as to the weight of evidence or of judgment upon a certain state of facts the Department has held that the allowance of the claim of a widow under the general law would also carry with it the allowance of the claim of a minor child, but never has it been held or claimed that where the allowance to the widow had been the result of fraud, mistake of fact, or, as in this case, palpable error of law, such adjudication would establish the claim of a minor child upon the principle of *res adjudicata*, or would preclude the Pension Bureau or this Department from correcting the error that had

been committed upon the adjudication of the minor's claim. On the contrary, the provisions of the pension law expressly provide, and make it the duty of the Commissioner of Pensions whenever, after the allowance of a claim, it is discovered that error such as was committed in the allowance of pension to the widow of this soldier has been done, to immediately correct the same, and to either terminate the erroneous pension entirely or to readjust the same in accordance with the law and the true facts in the case. If this were not the case it would be impossible to correct any error in the allowance of a pension, however gross and palpable, simply for the reason that the right to the pension having been once passed upon and decided by the Pension Bureau it could not afterwards be disturbed, because it was *res adjudicata*. This position would lead to such wrongful expenditure of public funds, and would be so inconsistent with sound reason and common sense, that it does not merit serious consideration.

It is but a poor argument to urge that because the mother of this minor was illegally and wrongfully allowed and paid a pension as the widow of the soldier, the error thus committed should be perpetuated by another illegal allowance of pension to the minor child of the soldier.

However much the gallant and heroic circumstances under which the soldier met his death and the fact that his widow was allowed and paid a pension may appeal to the sympathies on behalf of his minor child, the facts and the law in this case are too plain and obvious to admit of controversy and preclude the allowance of the present claim of the minor, simply for the reason that the law does not provide a pension for her unless it be shown that the death of her father occurred in line of duty, and it is shown beyond all question that his death did not occur in line of duty within the meaning and intent of the provisions of the pension law.

Therefore the rejection of this claim for minor's pension upon the ground stated is hereby affirmed.

DIVISION OF PENSION—ACT MARCH 3, 1899—PRACTICE.

BOWMAN *v.* BOWMAN.

Rule 10 of Practice before the Commissioner of Pensions, allowing ninety days in which to furnish evidence called for by the Bureau, is not applicable to cases for division of pension under the act of March 3, 1899. See Rules of Practice, of May 21, 1902, as amended by Order No. 69, of May 20, 1903, pars. 14 and 15. Hyatt *v.* Hyatt (14 P. D., 8).

Claimant delayed for over thirty days to furnish the evidence called for by the Bureau, and made no application for extension of time. The rejection of her claim on the evidence then on file, which failed to establish her *necessitous* circumstances, within the meaning of said act, was not error.

The evidence in this case fails to show that claimant is in *necessitous* circumstances, within the meaning of the act of March 3, 1899.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, August 17, 1903.

Claimant, Catharine Bowman, filed her declaration April 7, 1902, for one-half the pension of her husband, Isaac O. Bowman, a pensioner at \$12 per month, under certificate No. 219479, wherein she alleged that he had deserted her in 1887 and was an inmate of a national military home.

Her claim was rejected by the Bureau May 27, 1903, on the ground that she was not in necessitous circumstances within the meaning of the act of March 3, 1899.

From this Bureau action claimant, by her attorney, Ewing Cockrell, appealed to the Secretary June 27, 1903, contending as follows:

That under date of March 2, 1903, the Commissioner called for evidence as follows: Claimant's statement as to property owned by her; affidavit of proper officer showing assessed value of her property, etc.; copy of mortgage on property, and affidavit of claimant as to her earnings. Under date of May 27, 1903, the claim was rejected. *Meanwhile above evidence had not been furnished nor had claimant been able to furnish it so soon.* As a matter of fact this evidence shows that claimant's only property is a farm which yields so little income and is so heavily incumbered that her net income is practically nothing and she is supported by her son. This evidence has this day been sent to the Commissioner of Pensions.

Wherefore claimant prays that you will take up said claim and consider it with said evidence, or remand same to the Commissioner for consideration with such evidence. It is manifestly unjust that the claim should be adjudicated within less than ninety days from the call for evidence, without such evidence having been received.

Before the Bureau it was contended on behalf of claimant that the Bureau action was in direct conflict with Rule 10 of Practice before the Commissioner of Pensions.

Rule 10 of Practice before the Commissioner of Pensions, allowing ninety days in which to furnish evidence called for by the Bureau, is not applicable to cases for division of pension under the act of March 3, 1899. See Rules of Practice of May 21, 1902, as amended by Order 69 of May 20, 1903, paragraphs 14 and 15, a copy of which order is hereto appended. See also departmental decision in the case of Hyatt v. Hyatt (14 P. D., 8).

As contended in said appeal, the records in this case show that the Bureau, on March 2, 1903, called for additional evidence, specifically designating the character of the evidence required. No response was made to said Bureau call until June 23, 1903, three months and twenty days subsequent to the call therefor.

The Department is of the opinion that claimant, having delayed for over thirty days to furnish the evidence called for by the Bureau, and having made no application for extension of time in which to furnish the evidence called for, that the rejection of her claim on the evidence then on file, and which failed to establish her necessitous circumstances within the meaning of said act, was not error.

Justice to pensioner, as well as to a meritorious claimant, requires that there be no unnecessary delay in the prosecution and adjudication of claims under the first three provisos of the act of March 3, 1899. *Randall v. Randall* (13 P. D., 411).

The practice and procedure in claims for division of pension under the act of March 3, 1899, and the reasons why a speedy determination of the rights of the claimant and pensioner should be had in this class of claims, and the care observed by the Bureau and this Department in guarding the rights of the parties, observing the rules of notice, and allowing them their "day in court," were set forth at some length in the case of *Hyatt v. Hyatt* (*supra*). As was stated in said decision:

If the unsuccessful party is allowed to file supplemental testimony, motions to reopen a claim, appeals from the Bureau action thereon, and motions for reconsideration of departmental decisions, it would result in withholding payment of one-half of a granted pension indefinitely, and probably during the life of the claimant or pensioner.

Under present practice a claimant is required to support her application with evidence sufficient to establish a prima facie case. Pensioner is promptly notified of the claim made, and is required to file his answer and defense within thirty days. Claimant is required to file her rebuttal evidence within thirty days, whereupon the case is adjudicated by the Bureau, and both parties are, under rule 16 of Departmental Practice, notified of the action taken, and are allowed thirty days from the receipt of said notice in which to appeal.

In contested cases under said act, where an issue of fact is joined between the claimant and pensioner, the determination by the Bureau of said issue should be final, and conclusively settle the question discussed and prevent the parties from subsequent prosecution of a claim founded on the same facts. To such cases the doctrine of res adjudicata and estoppel should apply.

The Bureau practice, involving claims under the act of March 3, 1899, was materially changed by the departmental decision of Assistant Secretary F. L. Campbell May 8, 1902, in the case *Adams v. Adams* (12 P. D., 370), and on May 21, 1902, the Bureau issued an order regulating the Bureau practice in conformity with said departmental decision. Said order, with some slight amendments, is now embodied in Order 69 of May 20, 1903, and approved by this Department. This order was carefully prepared, and as it embodies the present Bureau practice in cases arising under said act, a copy of said order is appended to this decision to be forwarded, together with a copy of this decision, to each of the parties herein, or their attorneys, and will be published as an appendix to this decision.

Considering now the question as to whether the evidence filed establishes the fact that claimant was in necessitous circumstances, within the meaning of said act, at the date of filing her said declaration, it appears from claimant's testimony that she is 58 years of age and is the owner of a farm of 120 acres, the rental cash value of which is \$120 per annum.

J. H. Bowman, aged 31 years, a son of claimant and pensioner, and one of her witnesses, testified in an affidavit March 31, 1902, that—

All the property on the farm is assessed to my mother, but she owns none of it except household furniture and one cow. She is practically supported by me; the actual value of the grain rent for one-third, for the last year, was about \$75. Her farm is mortgaged for \$1,050. Its rental value is about \$1 an acre cash, annually.

Another of her witnesses estimates the value of claimant's farm at from \$1,800 to \$2,000.

Pensioner is 64 years of age, an inmate of a Soldiers' Home, and is not shown to be in possession of any means of support aside from his pension of \$12 per month.

The Bureau held, in effect, that the foregoing testimony did not establish claimant's necessitous circumstances, and in this conclusion the Department concurs.

On June 23, 1903, claimant's attorney filed, in response to the Bureau call of March 2, 1903, for additional evidence, an affidavit showing that claimant's property, real and personal, was assessed at \$1,563 in 1902, which said assessment valuation was two-thirds of the real value.

Also the affidavit of claimant, in which she testified that her 120-acre farm was worth about \$2,000, upon which there was a mortgage of \$1,050. She further testified as follows:

Farm is run by my son, who owns the stock, machinery, etc. He supports me, practically, as my rent from the farm would not exceed \$1 an acre, cash, or \$120 a year, out of which I would have to pay interest, \$52.50, also taxes and repairs amounting to about \$60.

Also a copy of a deed of trust on her farm, executed June 15, 1899, to secure the payment of said \$1,050.

The foregoing comprises all the additional evidence filed by claimant, and this testimony appears to have been passed upon by the adjudicating officer in the law division of the Bureau July 1, 1903, who expressed the opinion that said additional evidence only sustained the Bureau action rejecting the claim on the ground stated. In this opinion the Department also concurs. See departmental decisions in the cases of *Fisher v. Fisher* (12 P. D., 336-339); *Pierce v. Pierce* (Ibid, 412-415); *Dustin v. Dustin* (13 P. D., 77); *Sherman v. Sherman* (Ibid, 203); *Parker v. Parker* (Ibid, 233), and *Daugherty v. Doherty* (Ibid, 302).

There are other reasons why, under the present status of the evidence offered by the pensioner in his defense, claimant would not be entitled to one-half his pension, but in view of the foregoing conclusion reached by the Department it is unnecessary to discuss or pass upon them.

As the evidence in this case fails to show that claimant is in necessitous circumstances within the meaning of the act of March 3, 1899, the Bureau action appealed from is affirmed.

The order referred to in the foregoing decision is as follows:

DEPARTMENT OF THE INTERIOR, BUREAU OF PENSIONS,
Washington, D. C., May 20, 1903.

ORDER No. 69.]

In the adjudication of claims under the act of March 3, 1899, the following rules of practice, amending the rules of practice of May 21, 1902, will be observed and followed:

1. All claimants under the act of March 3, 1899, will be required to file with their declarations proof in support thereof sufficient to establish a *prima facie* case under the law.

2. Where the claim is filed by the wife, alleging that the pensioner has deserted her for a period of six months or more subsequent to March 3, 1899, and prior to the filing of the declaration, the declaration must be accompanied by evidence showing that she is the wife of the pensioner; that the pensioner has deserted her for the period alleged in the declaration, and that she is a woman of good moral character and in necessitous circumstances.

3. Where the claim is filed by the wife, alleging that the pensioner is an inmate of a State Soldiers' or Sailors' Home, or a National Soldiers' Home, the declaration must be accompanied by evidence showing that the claimant is the wife of the pensioner, and that she is a woman of good moral character and in necessitous circumstances.

4. Where the claim is filed by or on behalf of the minor child or children—under 16 years of age—of a pensioner, alleging that pensioner has deserted such child or children for a period of six months or more subsequent to March 3, 1899, and prior to the filing of the declaration, the declaration must be accompanied by evidence showing the marriage of the parents, the date of birth of each child, the death or divorce of the wife of the pensioner; that he has not remarried since such death or divorce, and that the pensioner has deserted such child or children for the period alleged.

5. Where the claim is filed by or on behalf of the minor child or children—under 16 years of age—of a pensioner, alleging that the pensioner is an inmate of a State Soldiers' or Sailors' Home, or a National Soldiers' Home, the declaration must be accompanied by evidence showing the marriage of the parents, the date of birth of each child, the death or divorce of the wife of the pensioner, and that he has not remarried since such death or divorce.

6. Where the claim is filed by or on behalf of a permanently helpless and dependent child of a pensioner, alleging that pensioner has deserted such child for a period of six months or more subsequent to March 3, 1899, and prior to the filing of the declaration, the declaration must be accompanied by evidence showing the marriage of the parents, the date of birth of the child, the death or divorce of the wife of the pensioner; that he has not remarried since such death or divorce; that the pensioner has deserted such child for the period alleged, and that the child is permanently helpless and dependent.

7. Where the claim is filed by or on behalf of a permanently helpless and dependent child of a pensioner, alleging that pensioner is an inmate of a State Soldiers' or Sailors' Home, or a National Soldiers' Home, the declaration must be accompanied by evidence showing the marriage of the parents, the date of birth of the child, the death or divorce of the wife of the pensioner; that he has not remarried since such death or divorce, and that such child is permanently helpless and dependent.

8. A declaration unaccompanied by evidence as indicated herein, sufficient to establish a *prima facie* case, will not be considered as conferring any right upon the claimant, or as serving notice upon the Bureau sufficient to warrant the suspension or the withholding of any part of the pension due or owing to the pensioner. Upon receipt of a declaration, unaccompanied by evidence as indicated herein, it should

be promptly returned to the claimant, with a notification that until the same is remedied in accordance therewith, it can not be considered.

9. Upon the filing by the wife, minor child, or children, or permanently helpless and dependent child of a pensioner, of a declaration accompanied by sufficient evidence to show a prima facie case under the act of March 3, 1899, the United States pension agent will at once be instructed to suspend payment of one-half of the unpaid pension due the pensioner for the period subsequent to the date of statutory desertion, or his entrance into a State or National Soldiers' Home, and to withhold from him one-half of the pension due and payable to him for the period subsequent to the date of the filing of the declaration, and during the pendency of the claim under the act cited.

The United States pension agent, upon the receipt of a notice from the Commissioner of Pensions to suspend payment of one-half the pension of the pensioner, will make a record entry thereof, and promptly acknowledge receipt of said notice of suspension, and thereafter he will make no payment of the one-half suspended portion of the pension to any person until further directed by the Commissioner of Pensions.

In case the pensioner is an inmate of a National Soldiers' Home, the treasurer of said Home will, on the same date of the notice of suspension to the United States pension agent, be duly advised, through the governor of said Home, of said notice of suspension. If, on the date of receipt of said notice by the treasurer of the Home, he shall be in possession of any unexpended pension money drawn in pensioner's behalf, or to which the pensioner became entitled during his residence in said Home, subsequent to March 3, 1899, the treasurer shall withhold and retain in his possession one-half of said unexpended pension money, subject to the future order of the Commissioner of Pensions.

10. The filing of an application or declaration by a claimant under the act of March 3, 1899, like an appeal by claimant or pensioner, shall serve the same purpose as a writ of supersedeas, or other similar writ, and shall stay further Bureau proceedings, so far as they involve further payment of the one-half of the pension in controversy, pending the adjudication of the claim by the Commissioner of Pensions.

11. In all cases filed under the act of March 3, 1899, and allowed, the claimant is entitled to one-half of so much of the unpaid pension as is due or owing to the pensioner at the date of the filing of the declaration, and covering the period from the date of the statutory desertion, subsequent to the passage of the act of March 3, 1899, or covering the period from the entrance of the pensioner into a State Soldiers' or Sailors' Home, or a National Soldiers' Home, subsequent to the passage of the act of March 3, 1899. In cases of desertion where the desertion occurred prior to the passage of the act of March 3, 1899, the date of statutory desertion will be accepted as March 4, 1899. In cases where the desertion occurred subsequent to March 3, 1899 (the date of the passage of the act), the date of the actual desertion will be accepted as the date of the commencement of the statutory desertion. No right can accrue to a claimant until the pensioner has been in actual desertion for a period of over six months prior to the execution of her declaration, and no right of application under the act can accrue on account of desertion until six months have expired from the date of such desertion.

12. In cases filed under the act of March 3, 1899, where the pensioner is an inmate of a State Soldiers' or Sailors' Home or a National Soldiers' Home, the actual date of entrance into the Home subsequent to March 3, 1899, will govern. If at the date of the passage of the act the pensioner was an inmate of a State Soldiers' or Sailors' Home or a National Soldiers' Home, the right of application immediately became operative, and March 3, 1899, will be considered, in such cases, as the statutory date of the pensioner's entrance into the Soldiers' Home, and payment, if the claim is

allowed, shall be one-half of so much of the pension as remained unpaid and due and owing to the pensioner at the date of the filing of the declaration.

13. Where an increase of pension is allowed a pensioner subsequent to the allowance of the wife's claim under the act of March 3, 1899, the wife shall be entitled to one-half of only so much of the pension as is due the pensioner covering the period subsequent to the statutory desertion established in her claim, or subsequent to the date of the entrance of the pensioner into the Soldiers' Home subsequent to the passage of the act of March 3, 1899.

14. As promptness in the adjudication of claims filed under the act of March 3, 1899, is imperative to avoid vexatious charges against one or the other, both the claimant and the pensioner will be required to answer calls made for evidence promptly.

15. Where a *prima facie* case has been filed by the wife, the pensioner will receive the usual notice of the filing of the claim, and will be allowed thirty days, as herein provided, from the receipt of said notice, to answer the allegations made by the wife. Where the pensioner has made answer, and in rebuttal filed evidence, the claimant will be allowed thirty days from the receipt of a notice of said allegations to answer same and complete her claim in accordance with the terms of the act of March 3, 1899. Should she fail to complete her claim, or fail to give a satisfactory reason for so doing, the case should be rejected, on the ground that claimant has failed to establish title within the meaning of the act of March 3, 1899.

16. Where the pensioner receives the usual thirty-day notice of the filing of the claim under the act of March 3, 1899, and fails to make answer within thirty days from the receipt thereof, he will be considered as waiving his right of answer, and the registry receipt card, or other evidence, showing his receipt thereof, will be considered as proof of service upon him of notice of the filing of the claim and his waiver of answer thereto.

17. Upon the adjudication of a claim under the act of March 3, 1899, the Bureau will promptly notify both parties, or their attorneys, if any, of the action taken, by registered letter, informing both that thirty days from the receipt of said notice will be allowed for the purpose of appealing from the decision of the Bureau; and there shall be inclosed to each a copy of Rules 16 to 20 of Practice. No payment will be made until the expiration of said thirty days, unless the right of appeal shall be sooner waived.

18. Upon the filing of an appeal, in accordance with the rules of the Department, payment will be still suspended, pending the decision of the Department upon the appeal, as required by Rule 16 of Practice.

19. If no appeal is filed within thirty days from the date, as shown by the return registry receipt card, payment will be made in all cases allowed, and suspension of payment will be removed in all cases rejected, and the full amount of pension restored to the pensioner in the last-named cases.

20. Any and all payments of one-half the pension to any of the beneficiaries named in the first three provisos of said act of March 3, 1899, shall hereafter be made by and through the United States pension agents, and in future no payment shall be made to any of said beneficiaries by the treasurer of a National Soldiers' Home, except one-half of so much of the pensioner's pension as shall be in the hands of the treasurer of said Home, and unexpended, at the date of filing the claim under said act, in which case the treasurer shall withhold and disburse upon the order of the Commissioner of Pensions, as provided in paragraph 9 of this order.

(Signed)

E. F. WARE, *Commissioner.*

DEPARTMENT OF THE INTERIOR, *May 22, 1903.*

Approved.

(Signed) THOS. RYAN, *Acting Secretary.*

DIVISION OF PENSION—ACT MARCH 3, 1899—PRACTICE.

WASHBURN *v.* WASHBURN.

Where claimant delayed for over two months to file the necessary evidence, called for by the Bureau, to establish her claim under the first proviso of the act of March 3, 1899, the rejection of her said claim will not be reversed because she has subsequently filed the evidence called for, her laches being unexplained, and no application for extension of time having been made to the Bureau.

Claimant having failed to complete her claim, it was properly rejected under paragraph 15 of Order No. 69, approved May 20, 1903.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, August 17, 1903.

Mrs. Amelia Anna Washburn appealed June 17, 1903, from the Bureau action of June 2, 1903, wherein her claim filed March 7, 1903, for one-half her husband's pension, was rejected on the ground she had failed to furnish the necessary evidence to establish her title under the act of March 3, 1899.

Claimant's sole contention in her said appeal is that her case was adjudicated three days prior to the receipt by the Bureau of the evidence called for.

Claimant filed her application March 7, 1903. On March 23, 1903, the Bureau called for additional evidence necessary to complete her claim, specifically designating the nature of the testimony required. She having failed to furnish said testimony, her claim was rejected June 2, 1903, for that reason.

It further appears that a prior application, filed by claimant September 21, 1900, was rejected August 8, 1901, because of her failure to furnish evidence to establish her claim.

It appears that on June 5, 1903, claimant filed additional evidence, but whether the same was sufficient to establish her claim it is not necessary now to consider.

Paragraph 15 of Order No. 69, approved May 20, 1903, provides that—

Where a prima facie case has been filed by the wife the pensioner will receive the usual notice of the filing of the claim, and will be allowed thirty days, as herein provided, from the receipt of said notice, to answer the allegations made by the wife. Where the pensioner has made answer, and in rebuttal filed evidence, the claimant will be allowed thirty days from the receipt of a notice of said allegation to answer the same and complete her claim in accordance with the terms of the act of March 3, 1899. Should she fail to complete her claim or fail to give a satisfactory reason for so doing, the case should be rejected, on the ground that claimant has failed to establish title within the meaning of the act of March 3, 1899.

Claimant delayed for over two months to file the necessary evidence, called for by the Bureau, to establish her claim under the first proviso of the act of March 3, 1899, and the rejection of her said claim will

not be reversed because she has subsequently filed the evidence called for, her laches being unexplained, and no application for extension of time having been made to the Bureau.

The reason why delay in the prosecution or adjudication of claims under the act of March 3, 1899, was to be avoided was fully set forth in the recent departmental decision in the case of *Hyatt v. Hyatt* (14 P. D., 8).

Paragraph 14 of said Order No. 69 also provides that—

As promptness in the adjudication of claims filed under the act of March 3, 1899, is imperative, to avoid vexatious charges against one or the other, both the claimant and the pensioner will be required to answer calls made for evidence promptly.

Claimant having failed to complete her claim, as required by Bureau, it was properly rejected under said paragraph 15 of Order No. 69.

The action appealed from is accordingly affirmed.

RESTORATION—ACT MARCH 3, 1901—REMARRIAGE—DROPPING.

ISABELLA WINFIELD (WIDOW).

Claimant, a pensioner under the general law, was deprived of pension, and payment thereafter made to the guardian of the minor, under what is now section 4706, Revised Statutes, because she had abandoned the care and custody of the said minor. She thereafter remarried, she claims the second husband is dead, and invokes the act of March 3, 1901.

Held: The act of March 3, 1901, has no bearing whatever, either by implication or otherwise, upon the statute under which this claimant's pension was suspended; it relates only to the title and status of widows whose names have been dropped from the pension rolls because of their remarriage.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, August 17, 1903.

Isabella, as widow of James C. Winfield, formerly a private in Battery E, Fifth U. S. Artillery, appears to have been pensioned under the general law, soldier having died in the service on November 6, 1865. This pension included one for a minor child and was paid to September 4, 1868, when payment was suspended to her, it being thereafter made to Deborah A. Benedict, as guardian of the minor, because of the abandonment of said minor by his mother; this procedure being taken by reason of what is now section 4706, Revised Statutes. The widow remarried March 24, 1870; she claims her second husband died January 31, 1900, and she filed her application for restoration under the act of March 3, 1901, on September 16, 1901, claim being rejected November 12, 1901, on the ground of no title under the act invoked. An appeal was filed June 27, 1902.

This appeal contends that this claimant's name was dropped from the roll because of her remarriage, and that section 4706, Revised

Statutes, can not override the plain intent of the act of March 3, 1901, the argument being based upon the statement that claimant's name was not dropped from the roll because of her abandonment of her minor child, but on account of her remarriage.

The evidence in this case shows that on April 21, 1869, Deborah A. Benedict was appointed guardian of the minor in this case by the probate court of Wyoming County, Pa., upon evidence being adduced showing the mother to have abandoned the care and custody of the said minor. She filed her bond of \$500 in said court, the same was approved, and payment was made to said guardian during the period of the minor's pensionable minority.

Section 4706, Revised Statutes, directs the Commissioner of Pensions to pay the pension to which the widow is entitled to the guardian of the child when it is duly certified, under seal, by any court having a probate jurisdiction, that satisfactory evidence has been produced before such court, upon due notice to the widow, that she has abandoned the care of such child or children, or that she is an unsuitable person, by reason of immoral conduct, to have the custody of the same. Acting under this mandate, the Commissioner of Pensions did pay, in this case, the pension to the guardian of the child; and it is thus seen that the contention of the appellant to the effect that the widow's name was dropped from the roll because of her remarriage is unqualifiedly contrary to the fact in the case.

The act of March 3, 1901, invoked in the present instance, is—

An act amending section forty-seven hundred and eight of the Revised Statutes of the United States in relation to pensions to remarried widows,

and that part of the act applicable to the present case is as follows:

That any widow * * * whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person who has since died or shall hereafter die * * * shall be entitled to have her name again placed on the pension roll. * * *

This act relates only to section 4708, Revised Statutes, has no bearing whatever upon section 4706, Revised Statutes, and affects only the title and status of those whose names have been or shall hereafter be dropped from the pension roll by reason of remarriage. This act can not by any possible implication affect one whose pension has been suspended by reason of section 4706, Revised Statutes.

There is no virtue in the appellant's contention, and she has no title under the act of March 3, 1901.

Action affirmed.

DIVISION OF PENSION—ACT MARCH 3, 1899—DESERTION.

HENDERSHOTT *v.* HENDERSHOTT.

The evidence in this case fails to establish the fact that pensioner deserted claimant or that he was the party in fault for the separation.

Where the wife, by her cruelty and misconduct, drives her husband from her, it may be presumed that she intended to effect a separation by her illegal acts. The one who intentionally drives the other away is the deserter. *Rothery v. Rothery* (11 P. D., 77, 377); *Whitney v. Whitney* (*Ibid*, 301); *Lockard v. Lockard* (14 P. D., No. 12, current series); *Barnett v. Barnett* (27 Ind., 471); *Warner v. Warner* (54 Mich., 492); *Lea v. Lea* (99 Mass., 493).

Drafting affidavits for both parties and their witnesses and administering the oath as a notary public do not raise the presumption that the person performing said acts is the attorney for either party, nor is he thereby disqualified from subsequently becoming the attorney for either of the parties in a claim for division of pension under the act of March 3, 1899.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, August 17, 1903.

Mrs. Electa M. Hendershott, by her attorney, Oscar F. Lochhead, appealed, June 6, 1903, from the Bureau action of May 15, 1903, rejecting her claim, filed October 16, 1901, for one-half the pension of her husband, John F. Hendershott, a pensioner at \$12 per month, under certificate No. 849460, wherein the Bureau held that—

Claimant is not in necessitous circumstances within the meaning of the act of March 3, 1899, nor is statutory desertion established within the meaning of said act.

It is contended on behalf of claimant in her said appeal:

First. It has been proved by testimony forwarded to the Bureau of Pensions that the soldier, without just cause or provocation, on or about July 29, 1889, deserted the claimant; that it has also been proved that the soldier had no cause for deserting the claimant by his not being able to obtain a decree of divorce from the claimant.

Second. It has been proved by testimony forwarded that the claimant had the sum of \$2,200 willed to her by her aunts, and that the soldier had the use of this money, and expended the major part of it for his own benefit, and when he deserted her left an indebtedness of several hundred dollars, which she was obliged to assume, and to pay this large indebtedness the claimant was obliged to mortgage her farm for over two-thirds of its valuation, besides his leaving the farm in poor state of cultivation, very poor fences, and the like throughout.

Third. That the claimant, on account of her age, is not able to perform labor to earn her support, and is not financially able to hire help to work her farm, and having so large an indebtedness, which was contracted by the soldier before he deserted her, that she is placed in necessitous circumstances, and the affiant believes that the claimant's circumstances, as proven, come within the meaning of the act of March 3, 1899, and also believes that the desertion established comes within the meaning of said act, as the soldier deserted the claimant without any just cause whatever and the affiant therefore respectfully asks another review of this case, as he believes an error must have been made by the Bureau of Pensions in reviewing the testimony in the claims.

Pensioner, in answer to said appeal, denies that he deserted claimant, or that she is in necessitous circumstances, and alleges that she drove him from home by cruelty and abuse; that she threatened to run him through with a pitchfork and locked him out of doors, and was so vicious, profane, and abusive that his life was in danger; that he did not expend his wife's money and only received \$10 from her with which to buy a suit of clothes; that when he left her he took nothing but the clothes he wore, while she had a farm in a good state of cultivation; that he engaged claimant's attorney to draft and prepare his affidavit and the affidavits of his witnesses, not knowing that he was the attorney for claimant, and charges said attorney with inconsistency in now appearing as the attorney against him; that he is feeble, in ill health, 66 years of age, and dependent upon his pension for his support.

The evidence shows that claimant and pensioner were married in 1865; that they cohabited as husband and wife, rearing a family of children, two of whom are now living; that they separated in July, 1889, and have not since lived together.

In reference to their separation claimant, 62 years of age, testified in an affidavit February 17, 1902, as follows:

About July 29, 1889, without just cause, John F. Hendershott deserted the claimant. In the matter of threatening to pitchfork him, the circumstances are as follows: The day before he left her he complained of being sick, was in the house all day till next morning about noon; he then went to a neighbor, coming back about 5 o'clock p. m. We had a field of grass cut down, and my son, 14 years old, and myself were getting ready to draw in. My son was using the horserake, getting the hay into windrows. Hendershott ordered him to get off that rake, and took possession himself, coming toward her. She stepped up, took the horse by the bit, and asked him to get off the rake and let the boy do the work. He refused, and I then told him to get off the rake, but he would not. She then told him again to get off the rake. He said to her, "You have another of your tantrums." I told him to get off again. He replied, "I shan't do it." She then told him that she would stick him with a pitchfork if he did not get off the rake. He did not get off, and continued to work until the hay was all raked up, then came to the barn, put the horse in the stable, came to the house, and ate his supper. After sitting in a rocking-chair till 3 o'clock in the morning, he then laid down on the lounge till breakfast time, when he ate his breakfast, packed up his things, and went away about 11 o'clock a. m.

Mrs. Luella Adams, the eldest child of claimant and pensioner, aged 29 years, testified in an affidavit November 30, 1901, as follows:

She had always lived with her parents up to the year 1889 when her father left her mother on account of ill-treatment he received from her. I overheard many of the disputes and quarrels between the two, and have always considered that Mrs. Hendershott was in the wrong; that she lived with her mother until 1892, when she was married.

The son, Lyman J., who was the innocent cause of his parents' last quarrel, has not testified, although still alive and living with his mother.

The testimony shows that pensioner is a man of good and temperate habits, and this fact is not denied by claimant. He is shown to be wholly incapacitated for earning a support by manual labor; suffering from disease of the digestive organs, right inguinal hernia (complete), and rheumatism. There is no testimony indicating that he is a quarrelsome man, or that he ever abused his wife or family or gave her any just cause for her ill-treatment of him. He does not appear to be absent against her will or consent.

The testimony of pensioner and his witnesses tends to show that claimant is a woman of violent temper and abusive in her language to her husband without just cause, and, as one credible witness testified, "is dishonest, has a violent temper, and turned her husband out of doors." She was evidently the head of the household, and, if she had desired, could have retained the affection and bodily presence of her husband. That she does not desire his presence at home is evident, and that her conduct for some time prior to and upon the date of the separation was such as would naturally tend to drive her husband from her is established.

The contention of claimant's attorney that pensioner's failure to obtain a decree for divorce from claimant proves that he had no cause for deserting her, is not well taken. Pensioner based his claim for divorce solely upon the ground of "extreme cruelty," under section 6229, Howell's Annotated Statutes of Michigan, which provides that—

A divorce from bed and board forever, or for a limited time, may be decreed for the ground of extreme cruelty, whether practiced by using personal violence, or by any other means; or for utter desertion by either of the parties for the term of two years; and a like divorce may be decreed on the complaint of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do.

The charges of extreme cruelty are embraced in paragraphs 5 and 7 of pensioner's bill for divorce of December 12, 1898, and are as follows:

Fifth. That the said defendant disregarded the solemnity of her marriage vow, and has been guilty of extreme cruelty in this, that some twelve years ago defendant received from her aunt about \$2,100, and immediately commenced telling complainant and the neighbors that complainant had nothing; that everything was defendant's; that defendant then owned a house and lot in Mount Morris, and afterward purchased a farm of 40 acres of land in Thetford, where complainant moved with defendant; that complainant had nothing to do with the selling of the crops from the farm, and had none of the proceeds from said farm, but if he had any money he had to work for the neighbors, and defendant kept continually saying that he had nothing, and she took the charge and control of the farm; that defendant locked the door against complainant; that complainant was used worse than a hired man.

* * * Seventh. Your orator further says that while raking hay defendant came to the field and, taking a fork in her hands, told complainant that if he did not get off from the hay rake that she would put the fork through him; that the treatment from defendant had been so unbearable that the complainant took nothing but the clothes that he had on his back and his tools, and putting his father's and his

mother's pictures in his trunk, started to go, when defendant said she did not care where he went, and that he might go to hell for all she cared; that since that time defendant has not lived with complainant.

Claimant herein, the defendant in the divorce suit, made answer to said bill December 28, 1898, denying the allegations of cruelty as charged in said bill and alleging that she had always treated her said husband "as a loving and dutiful wife."

She further alleged in her said answer as follows:

She admits, however, that on one occasion she stated to complainant that she would put the fork through him if he didn't get off from the rake, but this defendant, at that time, did not mean to do it, and made no move toward doing it, and said complainant did not get off from the rake either, as he ought to have done, as he was engaged in a controversy with her boy in which it was a question whether the boy should obey her or said complainant in a matter that this defendant had the legal right to direct, and she denies that she said at any time that he might go to hell, or ever ill used him in any way. * * * That during the last eight years he has contributed nothing toward the support of this defendant, and has deserted and abandoned her without cause, and now to add insult to injury seeks a divorce from her. * * *

It is to be noted that the allegation of desertion in said answer was not specific, alleged no time or place, was not made the basis for any affirmative relief, and it is doubtful if any evidence as to desertion could have been received by the court under the pleadings if objected to. Counter charges in an answer should be alleged with all the particularity required in a bill, and must be proved substantially as alleged.

The foregoing bill and answer comprised the pleadings, whereupon the circuit court for the county of Genessee, Mich., rendered on June 7, 1899, the following decree dismissing the bill:

This cause having come on to be heard, upon the pleadings and proofs taken in open court, and having been argued by counsel for the respective parties, it is ordered, adjudged, and decreed, that the complainant's bill of complaint, be and the same is hereby dismissed with costs to defendant, to be taxed together with a solicitor's fee of \$30, and that she have execution therefor.

Claimant did not charge her husband with cruelty, or even assume that his alleged desertion was an act of cruelty. Under these pleadings, the only question fairly at issue before the court was that of extreme cruelty under the statute.

We are not justified in assuming that the court passed upon the question of desertion, or that it was necessarily involved in the decision rendered.

As was held in the case of *Lea v. Lea* (99 Mass., 493) where the record shows that a decree dismissing a bill for divorce might have been rendered upon either of two or more different grounds, and it does not appear from the record upon which ground it was rendered, it is not conclusive as to either, and was only conclusive by way of estop-

pel as to those facts which were necessarily involved, and without the existence or proof of which such decree could not have been rendered. (1 Freeman on Judgments, par. 271.)

In the case under consideration the sole issue involved in the divorce suit was cruelty, and the burden of proof to establish the fact in issue was upon complainant, the pensioner. In this he failed and his bill was dismissed.

In this claim for division of pension the burden of proof to establish statutory desertion under the first proviso of the act of March 3, 1899, is upon the claimant. *Rothery v. Rothery* (11 P. D., 377); *Christopher v. Christopher* (13 P. D., 383). The word desertion in said act is used in its general legal sense and means the willful withdrawal of the pensioner from his wife, or his voluntary refusal to renew a suspended cohabitation, without legal justification, either by the consent or wrongful conduct of the wife. If the separation is by consent, or in accordance with the wishes of the wife, or the result of her unwifely and illegal conduct, it does not constitute desertion. As stated by Graves, J., in defining desertion under the Michigan statutes—

Desertion implies a voluntary breaking off of matrimonial cohabitation by one party against the will of the other for the full period of two years, and under circumstances which the law does not consider sufficient to justify it. The separation required to constitute the offense must continue to be marked by the characteristics here indicated for the whole statutory period. *Porritt v. Porritt* (18 Mich., 420-424), cited and followed in the case of *Rudd v. Rudd* (33 Mich., 101).

It was further held in the *Porritt* case (*supra*), that the separation in that case was proper, although affording no ground for a divorce.

As stated by Stewart, on Marriage and Divorce, paragraph 257:

One party to a marriage is justified in leaving the other by the other's consent; conduct implying consent by the other; by such conduct on the part of the other as is cruel, outrageous, though not amounting to a cause for divorce.

Courts often grant a decree of separation while refusing a decree of absolute divorce. Much depends upon the facts in each particular case and the statutes under which the decrees are rendered.

Where the wife, by her cruelty and misconduct, drives her husband from her, it may be presumed that she intends to effect a separation by her illegal acts. The one who intentionally drives the other away is the deserter. (*Rothery v. Rothery*, 11 P. D., 77-377; *Whitney v. Whitney*, *ibid.*, 301; *Lockard v. Lockard*, 14 P. D.—; *Barnett v. Barnett*, 27 Ind., 471; *Warner v. Warner*, 54 Mich., 492; *Lea v. Lea*, 99 Mass., 493.)

In reference to the implied charge that the attorney for claimant, while acting as such, prepared and executed affidavits in the claim for pensioner and his witnesses, it appears that said attorney, as a notary public under State authority, did prepare and execute affidavits for

pensioner and several of his witnesses in November, 1901, at which time he does not appear to have been the attorney for either party, although he had previously and subsequently acted as notary public in preparing and executing claimant's application and the affidavits of some of her witnesses. There is nothing to indicate, and there is no reason for assuming, that he was then the attorney for either party, his duties being merely clerical and official as a notary prior to February 9, 1903, at which date he signed a communication to the Bureau of that date, in which he subscribed himself as "for the claimant." He was formally appointed her attorney by power of attorney May 25, 1893, and his first act as such attorney was the preparation and filing of said appeal.

Claims under the first, second, and third provisos of the act of March 3, 1899, are held not to be "claims for pension," and the employment and compensation by either party of an attorney or agent to prosecute or defend a claim for division of pension under said act is not controlled or fixed by sections 3 and 4 of the act of July 4, 1884, but fall within the rule announced by Mr. Justice Brewer in the case of *United States v. Koch* (21 Fed. Rep., 873), viz:

In the absence of a statute prohibiting it, any man may contract for his services. * * * Rendering them, he may charge the person seeking those services such fee as they may agree upon. It is not a matter which is *matum in se*—inherently vicious; it is a matter which is perfectly legitimate and proper in the absence of the prohibition of the statute.

See opinion of Assistant Attorney-General Van Deventer, approved and followed by Secretary Hitchcock, in the case of *Davis v. Davis* (10 P. D., 403), wherein it was held that—

The amount and method of making payment of the compensation of agents or attorneys for services in prosecuting an application for the divided payment of a pension under said act are not controlled by sections 3 and 4 of the act of July 4, 1884 (23 Stat. L., 98), but are matters of agreement and adjustment between the parties over which, in the absence of abuse or misconduct on the part of the agent or attorney justifying disbarment, the Commissioner of Pensions has no authority.

It follows from this opinion that the divided payment under the act of March 3, 1899, of the moneys accruing upon the pensions therein named must be made to the parties entitled by law to receive the same, without any deduction of the compensation of fees of agents or attorneys, and that agents or attorneys rendering services in proceedings under that act must look to those by whom they are employed, and not to the Pension Bureau, for payment of their services.

It was held in the case of *Oscar Meese* (5 P. D., 122-124) that "The act of administering an oath to an affiant is not a part of either the prosecution or defense of a claim against the Government."

While an affidavit sworn to before an officer authorized to administer oaths, who is also claimant's attorney, is irregular under the rules and regulations and decisions of this Department (see Pension Laws, Compilation of July, 1902, page 174, and departmental decision in the

case of Lydia A. Miner, 8 P. D., 104), yet it by no means follows that he is disqualified, by such clerical and official acts merely, from subsequently becoming an attorney in the case in claims under the act of March 3, 1899.

Claims under said act for division of pensions are in the nature of a suit at law involving the title to money, and where, as in this case, an issue of law and fact is joined between the claimant and pensioner, their interests are conflicting, justice to the attorney, as well as to the parties, forbids an attorney from acting for both parties. As was stated in the case of *Parker v. Parker* (13 P. D., 233): His acts and consents in such a case would be voidable at the option of either party, if not absolutely void, besides rendering him liable to either party for a breach of duty and subjecting him to disbarment before the Bureau and this Department.

There is nothing to indicate that the notary public in this case was, or considered himself, the attorney for either party at the time he drafted and executed the affidavits for both parties, or prior to February, 1903, after which time he ceased to execute any affidavits for either party, or to in any manner act for the pensioner. His conduct in this regard appears to have been in good faith, and pensioner does not appear to have been prejudiced thereby.

Drafting affidavits for both parties and their witnesses and administering the oath as a notary public do not even raise the presumption that the person performing said acts is the attorney for either party or disqualify him from subsequently becoming the attorney for either of the parties in a claim for a division of pension under the act of March 3, 1899. On the contrary, the certificate of the notary that he was not interested in the prosecution of the claim is evidence that he was not the attorney.

After careful consideration of all the evidence in this case, the Department is of the opinion that it fails to establish the fact that pensioner deserted claimant, or that he was the party in fault for the separation.

With this view of the case, it becomes unnecessary to enter into a discussion or pass upon the question of claimant's alleged necessitous circumstances.

The action appealed from rejecting the claim is affirmed.

DIVISION OF PENSION—ACT MARCH 3, 1899—NECESSITOUS
CIRCUMSTANCES.

HUNTER *v.* HUNTER.

By the term "necessitous circumstances" in the act of March 3, 1899, as applied to the condition of the wife, is meant her need of those necessities which are suitable to her situation and her husband's condition in life, and which he is bound to provide, or for which he is liable on an implied contract in case he fails to provide.

The financial, physical, and social condition of the pensioner are facts to be considered in connection with the other facts in the case in determining the actual necessitous condition of the claimant under the act of March 3, 1899.

Pensioner is 81 years of age, wholly incapacitated for earning his support by manual labor, and with no means of support aside from his pension of \$12 per month.

Claimant is 57 years of age, able to earn \$4 per week by manual labor, the owner of a 160-acre farm, valued by her and her witnesses at over \$1,500, subject to a mortgage of \$450, the rental value of the farm being about \$160 in 1902.

Held, Claimant is not in necessitous circumstances within the meaning of the act of March 3, 1899, and her claim was properly rejected.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, August 17, 1903.

Claimant, Mary A. Hunter, appealed June 26, 1903, from the Bureau action of May 9, 1903, rejecting her claim for one-half the pension of her husband, John Hunter, a pensioner under certificate No. 189223, on the ground that she was not in necessitous circumstances within the meaning of the act of March 3, 1899.

She contends in her said appeal that she is in necessitous circumstances on account of the uncertainty of crops in western Kansas, and her age and physical disabilities which disable her for the performance of hard manual labor; that the income from her farm does not, on an average, pay taxes, interest, and repairs; that soldier, by his admittance to a National Military Home, has deprived her of a home, and that he permits her to shift for herself, contributing nothing to her support, while he is having a good time spending his money foolishly. She further alleges that he promised to pay her \$5 per month if she took no action to secure one-half his pension, which promise he has not kept, wherefore she asks a reversal of said Bureau action.

Claimant, in her application, filed January 16, 1903, based her claim upon the third proviso of the act of March 3, 1899, viz, that pensioner was an inmate of a National Soldiers' Home.

The only question raised on this appeal is, whether claimant is in necessitous circumstances within the meaning of said act.

In an affidavit of April 27, 1903, claimant testified that she owned a farm of 160 acres, encumbered with a mortgage of \$450 at 7 per cent interest. She further testified that its value may be \$2,000, but it can not now and never could have been sold at that price; that the first rent she received from the same was for 1902, about \$160. She further testified as follows:

She has cooked for hands, wove carpets, and supported Mr. Hunter from the time they were married. That with her savings from the above-named occupations she secured enough to pay off a mortgage on the land now owned by her, and kept up taxes and repairs; that in addition to her earnings she sold all personal property in order to meet above mortgage, interest, and taxes on the land; * * * that she kept house one month for her son in Chicago and received \$12 therefor; that on account of rheumatism she was not able to perform the labor required of her, and that she is now earning \$4 per week washing dishes in a restaurant in Norton, Kans.

Eugene Hunter testified in an affidavit April 18, 1903, that he was the owner of a \$450 mortgage, drawing 7 per cent interest, dated June 22, 1901, on said farm of claimant, which is the first lien on said property, and that no part of said mortgage had been paid. He further testified as follows:

I am personally acquainted with the land which said mortgage covers, and consider it worth \$2,000. The above facts are known to me by reason of my personally seeing the land and by my being the present owner of said mortgage.

F. R. and E. H. Malaby testified in a joint affidavit March 17, 1903, that claimant received about \$160 as rent off of said farm in 1902, which was more than an average rental value.

Thomas Morris and J. A. Watts testified in an affidavit April 18, 1903, that they estimated the value of her farm to be about \$1,500 or \$1,600; that they based said value on other land of similar character and improvements thereon that had been sold within the last two years; that the first rent she ever received off the said land was about \$150 or \$160 for 1902.

G. R. Brown, clerk of Norton County, Kans., in an unsworn statement dated March 16, 1903, certified that claimant's farm was assessed at \$320 in 1902, which was about one-third its real value; she was also assessed for \$63 of personal property above exemption the same year, and that the same assessment prevails for the year 1903.

Pensioner testified in an affidavit February 20, 1903, that he was 81 years of age, with no property but his pension of \$12 per month; that he became an inmate of the Soldiers' Home at Leavenworth, Kans., in the fall of 1900, and that during the summers thereafter took furloughs and returned to his wife in Norton County, Kans., where he always paid her board when living with her, besides sending her a portion of his pension money at each payment day; that when he returned to her last summer his said wife dismissed him and asked him to take his things away and leave her, that she refused to let him live with her; that in the fall of 1902 his wife sold all of her personal property, consisting of cows, calves, and a horse and buggy, realizing therefor several hundred dollars, which money she converted to her own use; that she is now the owner of a quarter-section of land in said Norton County of the value of over \$2,000, which she has for years rented and has received and used all the rents arising therefrom; that she now has a large sum of money belonging to herself, the proceeds of her stock and rents from said farm and from her boarders, and that she is a strong and able-bodied woman and a thrifty manager; that she was then living in Chicago with her son who pays her \$18 per month for keeping house for him.

John Kelly, a witness for pensioner, testified in an affidavit February 20, 1902, that he is well acquainted with claimant's farm in Norton County, which is worth \$2,000; that claimant is a strong, healthy, able-

bodied woman, capable of earning good wages and succeeded well in boarding men on a ranch in Norton County; that pensioner is a very old man, about 81 years of age, quite feeble, with no bad habits whatever; that he neither drinks nor smokes, and is a respectable upright citizen; that he always treated his wife kindly when they were together, so far as he saw; that claimant had several daughters living with them, her children by a former marriage.

Lucius Atkins testified substantially to the same facts as the prior witness in an affidavit of February 26, 1903.

To entitle claimant to one-half her husband's pension she is required to show that she is in necessitous circumstances *Ashley v. Ashley* (13 P. D., 205). By the term "necessitous circumstances" in the act of March 3, 1899, as applied to the condition of the wife, is meant her need of those necessities which are suitable to her situation and her husband's condition in life, and which he is bound to provide, or for which he is liable on an implied contract in case he fails to provide.

The financial, physical, and social condition of the pensioner are facts to be considered in connection with other facts in the case in determining the actual necessitous condition of the claimant under said act. *Fisher v. Fisher* (12 P. D., 336-339). In that case the wife owned a house and lot valued at \$1,150; a lot valued at \$65, household furniture valued at \$50, and had \$150 in bank. She rented a house and by subleasing rooms supported herself. The Department held that she was not in necessitous circumstances within the provisions of said act, and was not entitled to one-half her husband's pension of \$17 per month, he being without other means of support than his daily labor.

In the case of *Pierce v. Pierce* (ibid, 412-415), claimant owned a house and lot assessed at \$200, which the assessor certified was its full cash value. Claimant, however, estimated the value of the property at \$400, and had \$200 at interest at 10 per cent. Pensioner, who was shown in that case to have deserted his wife, was 50 years of age, general condition fair, not wholly incapacitated for manual labor, and in receipt of an annual income of \$288 from his pension. The Department held that she was in necessitous circumstances.

In the case of *Dustin v. Dustin* (13 P. D., 77), the claimant was 58 years of age, in poor health, with one minor child dependent upon her for support. She was possessed of real estate assessed at \$300 cash valuation, and personal property valued at \$50. Her husband was 61 years of age, well nourished, not wholly incapacitated for earning his support by manual labor, and in receipt of an annual income of \$204 from his pension. Claimant was held to be in necessitous circumstances.

In the case of *Sherman v. Sherman* (13 P. D., 203), the pensioner was 60 years of age, with no means of support but his daily labor and a pension of \$16 per month. Claimant was about 55 years of age, and

the owner of a 10-acre farm, which afforded her a home, valued by her at \$600. She was held to be not in necessitous circumstances.

In the case of *Parker v. Parker* (ibid, 233) pensioner was dependent upon his pension of \$17 per month. His wife owned a 40-acre farm, valued by her at \$16 per acre, and was also possessed of certain personal property which, with her real estate, amounted to \$764. The Bureau held that she was not in necessitous circumstances, and in this holding the Department concurred.

In the case of *Daugherty v. Daugherty* (ibid, 302) it was contended that as the wife was not in receipt of a net income of \$250 per annum she was in necessitous circumstances within the meaning of the act of March 3, 1899, but the Department held that the act which provided that a widow who was without other means of support than her daily labor, and a net income of \$250 per annum (act of May 9, 1900), was not to be construed as applying to the necessitous condition of the wife, provided for in the act of March 3, 1899. In determining the dependence of a widow the pension laws exclude her daily labor and a net income not exceeding \$250. In determining the necessitous circumstances of the wife, both her earning capacity and income are included and are to be taken into consideration in connection with her husband's social position and ability.

Food, clothing, shelter, and medical attendance, are usually enumerated as constituting the absolute necessities of life, but, as stated by Bouvier:

The term necessities is not to be confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term which must be applied to the circumstances and condition of the parties. Bouvier's Law Dictionary, vol. 2 (15th ed.), 278.

As held by Assistant Secretary F. L. Campbell, in the case of *Fisher v. Fisher* (supra):

Pensioner's condition in life becomes material in determining the necessitous condition of the wife, as those words (necessitous circumstances) in the statute naturally refer to those necessities suitable to her situation and his condition in life, and which the husband is bound to provide or for which he is liable on an implied contract in case he fails to provide. The courts, in passing upon the question of the wife's necessitous circumstances, invariably refer to the husband's physical and financial ability, his condition in life, as well as the social condition of the parties.

No absolute rule can therefore be laid down which will be applicable alike to all cases, but the fact as to whether the wife is or is not in necessitous circumstances should, in the opinion of the Department, be ascertained and determined according to the evidence in each particular case, applying the well-known rules of law in cases involving the question of necessities. *Stewart on Marriage and Divorce* (par. 180), 2 Kent (p. 146); 15 Am. & Eng. Ency. of Law (2d ed.), (p. 875, 1, and note 1, p. 877); *Clark v. Cox* (37 Mich., 204, 211, and 212).

The duties of the wife, as wife, form the consideration of the husband's liability for her necessities. *McCutchen v. McGahay* (11 Johnson, 281); *Cunningham v. Irwin* (7 Sergt. and Rawle, 247).

In the case under consideration it appears from the evidence that pensioner is 81 years of age, wholly incapacitated for earning his support by manual labor, and with no means of support aside from his pension of \$12 per month.

Claimant is 57 years of age, with ability to earn \$4 per week by manual labor, and is the owner of a 160-acre farm, valued by her and her witnesses at over \$1,500, subject to a mortgage of \$450. The rental value of her farm is admitted by her to have been about \$160 per annum in 1902.

In view of the foregoing facts the Department is of the opinion that claimant can not be said to be in necessitous circumstances, within the meaning of the act of March 3, 1899, and her claim for one-half her husband's pension under said act was for that reason properly rejected.

The action appealed from is accordingly affirmed.

RESTORATION—FRAUD OR MISTAKE—VOID MARRIAGE.

ELIZA J. EVELAND (WIDOW).

Appellant was pensioned under the general law from May 17, 1871, to February 16, 1874, when her name was dropped from the rolls because of her supposed marriage with one Gray. Subsequently the minors' application was rejected on the ground that the widow was still living, her marriage to Gray being declared null and void on the ground that he had a wife living and undivorced at the time of his pretended marriage to claimant. Whereupon the widow applied for restoration, but her claim was rejected on the ground of no record nor other satisfactory evidence showing origin of fatal disease, and no satisfactory evidence of the existence of the same at discharge or for a long time thereafter, and that claimant, though aided by special examination, had failed to establish the claim.

Held, That claimant having once established her claim and having been allowed and paid the pension, that finding can not be legally set aside unless positive affirmative testimony is produced showing fraud or that the testimony on which the claim was allowed was not true.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, August 31, 1903.

William H. Eveland enlisted as a private in Company C, One hundred and twenty-eighth Illinois Volunteer Infantry, September 26, 1862. Soon thereafter, or within the short period of five months, the regiment lost 700 men, principally by desertion. The officers proved themselves utterly incompetent to perform the duties of their respective commissions, and were mustered out of service April 4, 1862, and the enlisted men formed into a detachment and retained in the service when consolidated with the Ninth Illinois Regiment. Eveland, the soldier herein referred to, was transferred to Company F, Ninth Illinois Volunteers, and subsequently transferred to Company A of that regiment, and finally discharged the service June 30, 1865. He never applied for a pension. He died May 17, 1871, and

on March 8, 1880, his widow, Eliza J., for herself and four minor children, applied for pension. Her claim was allowed December 23, 1892, it being held that death resulted from chronic diarrhea, complicated with disease of lungs, a cause which was legally accepted as originating in the service and in line of duty.

It appears that the widow remarried one William C. Gray February 15, 1874, the date when her pension terminated.

May 15, 1893, the surviving minor children of soldier, namely, William P., Eliza S., and Nancy E., Eveland, applied for pension as the children of said soldier, alleging that his death was due to a disability contracted in the service, and on August 20, 1898, the claims of the minors were rejected on the ground of—

No title; widow still living, and not legally remarried and evidence obtained on special examination shows that widow's remarriage to one William C. Gray February 15, 1874, was illegal, null, and void, said Gray at the time having a wife living from whom he had never been divorced and said wife is yet living.

November 23, 1898, the widow applied for restoration to the pension roll, alleging that her marriage to Gray had been pronounced illegal and void, and she asked to be restored to the roll as the widow of said soldier.

The claim was specially examined in the field in 1897, 1898, and 1900, and on November 9, 1900, her claim was rejected on the ground of—

No record and no other satisfactory evidence showing origin of fatal chronic diarrhea in service and no satisfactory evidence showing existence of same at discharge or for a long time thereafter, and claimant, though aided by a special examination, had failed to produce the necessary evidence to establish the claim.

It appears that additional testimony was thereafter filed and the witnesses testifying were interviewed by a special examiner in 1901, and on March 15, 1902, reopening was denied.

August 29, 1902, her attorney appealed. It is contended that—

If the evidence furnished by the claimant in her first claim was conclusive enough to warrant the allowance of a pension to her from the date of the soldier's death to the date of her remarriage, it should also admit of the allowance of her claim for restoration for pension, unless fraud or a plain mistake of facts or error of law is shown.

It appears that one Dr. S. H. Bundy was one of the principal witnesses upon whose testimony the claim was originally allowed. It is now held that Dr. Bundy's testimony is unreliable. A note following the official words rejecting the claim for restoration states:

Testimony of S. H. Bundy, calling himself medical officer of One hundred and twenty-eighth Illinois Volunteers and Ninth Illinois Volunteers, upon which claim was originally allowed, shown to be of no value. Bundy was a special examiner of this Bureau at one time; record bad.

This claim was originally allowed December 23, 1892, ten months after Bundy had left the Bureau on his resignation, which was duly accepted, and therefore long after the charges above referred to had been officially investigated.

In Bundy's original affidavit in this case, filed December 3, 1884, he stated that he was—

on duty with One hundred and twenty-eighth Illinois Infantry Volunteers as acting surgeon while said regiment was on duty at Cairo and Mound City, Ill., in the winter of 1862-63, and with the Ninth Regiment Illinois Infantry while around Atlanta in 1864.

He signed his name to this affidavit as—

Late surgeon on duty with One hundred and twenty-eighth Regiment Illinois Volunteers and Acting Assistant Surgeon U. S. Volunteers, in charge Ninth Regiment Illinois Volunteer Infantry.

The records do not show his name borne on the rolls of either of the regiments named.

In a letter to his attorneys, dated June 9, 1892, he stated his connection with said regiments as follows:

I reply to your letter of the 6th instant and also to the within letter of the adjutant-general of Illinois. I have to say that I was elected surgeon of the One hundred and twenty-eighth Illinois Volunteer Infantry; went with the regiment to Camp Butler, Cairo, and Mound City, Ill., fall of 1862, winter of 1862-63, and early spring of 1863, acting as "surgeon on duty," and part of the time, "surgeon in charge."

Dr. George W. French, first assistant surgeon, being really the only military medical officer, and I doing most of the work among the sick.

Owing to the disorganized state of the regiment, I declined a commission; but as most of the men were my neighbors and sons of neighbors, and nearly all became sick from exposure at Camp Butler, I could not leave them, but stood by them as purely a labor of love.

I never drew any pay from any source whatever. These facts have been stated and sworn to hundreds of times in original affidavits, statements to special examiners, etc., and never before questioned; and whether received by the Commissioner of Pensions now or not, is of no consequence to me.

An office examiner appended to the case the following note:

From the roster of army surgeons (p. 36), it appears that Dr. S. H. Bundy was present with the One hundred and twenty-eighth Illinois Infantry, December, 1862.

Dr. Bundy's explanation as to his service, etc., was in the record and evidently considered when the claim was admitted in 1892. He made his original affidavit September 5, 1884, when 60 years of age. He was interviewed by an examiner under the claim for restoration March 15, 1897, when 74 years of age. While his deposition is not so strong as his affidavit (evidently written by him), he testified that he knew the soldier before, during, and after his service, stating that he treated soldier, as he recollected, for diarrhea when he was a member of both the One hundred and twenty-eighth and Ninth Illinois; that after soldier's return home he saw him quite often; that he was always pale and thin and had no energy, and that he had a cough, etc.; that he often prescribed for soldier at his office; that he saw him every month and frequently every week after muster out, except for the six

or seven months before his death; that he was emaciated and broken down and appeared unable to do heavy work, and was devoid of ambition, etc.

The examiner, in making his report March 29, 1897, after taking twenty or more depositions, stated:

I am of opinion soldier died from the effects of chronic diarrhea and lung complications, not pneumonia, and that he was suffering with these disabilities at discharge and constantly suffered with the same from discharge till death. I am also of opinion soldier was free from these diseases at the time he enlisted. * * * I am of opinion soldier's death was the result of his army service.

Considerable testimony was thereafter taken by examiners in 1898 and 1900, some of which was negative in character and some supported the claim both as to origin and continuance.

It appears that restoration of the claim was denied because the testimony of Dr. Bundy could not be accepted as true. His testimony was considered reliable in 1892, and upon it and other testimony in the case the claim was admitted. His testimony was considered unreliable in 1900, and the claim rejected for want of sufficient evidence as to origin and continuance of the fatal chronic diarrhea.

This difference in the estimate placed on Dr. Bundy's reliability, and which resulted in the rejection of claim for restoration, grew out of the charges made against him above referred to, a charge of having falsified his pay account when a special examiner, and of having accepted presents, etc.

It is barely possible that when in December, 1892, the widow's claim was admitted, the charges against Dr. Bundy were not known to the officers admitting it. These officers, however, must then have known his connection or alleged connection with the One hundred and twenty-eighth and Ninth Illinois, and must have accepted his testimony as true, although probably knowing the then serious charges against him.

In the case of the minors of Daniel M. Easley (12 P. D., 179) it is said:

The evidence has been examined with sufficient care to ascertain that it afforded reasonable ground for the judgment rendered in 1897 in the case of the widow. It is readily perceived that there might be an honest difference of opinion as to whether said evidence established the service origin of the soldier's fatal disease or not, but the question having been adjudicated it should not, in the opinion of the Department, have been subsequently reopened in connection with the minors' claim. Public policy and a due regard for the rights of claimants require that there shall be, at some time, a final decision and an end to litigation. Where an invalid pensioner has died of some disease or disability for which he was pensioned, it would be a manifest hardship to require his widow to reopen and prove his title *de novo* in order to establish her own right to pension; and the same objections apply to requiring a minor to prove title in the widow. Not only would such a rule of practice work great hardship and injustice to claimants, but it would also greatly increase the work of the Bureau and resulting expense to the Government in the adjustment of claims.

Of course, where fraud is shown, or a plain mistake of fact or error of law, the case would be different. But in the absence of such showing, the Department is clearly of the opinion that a matter of fact which has been admitted as true in the claim of the soldier or his widow should not be called in question under a subsequent application filed by the person who succeeds to his or her pensionable right.

It may be said that the evidence as originally filed fairly made out a case of merit.

It appears to be admitted that soldier's death was due to chronic diarrhea complicated with lung disease. The question, therefore, in 1892 was whether the fatal disability had its origin in the service and in line of duty. As observed, origin in service was then admitted. Dr. Bundy was an important witness, but other testimony in the case also supported the claim.

When the claim for restoration was filed, the same was thoroughly investigated in the field and Dr. Bundy was interviewed and his former statement substantially corroborated. Other important witnesses also showed knowledge of both origin and continuance of the fatal disabilities. Restoration was, however, denied because of Bundy's "bad record." If his testimony could not be relied upon it would seem that it was useless to take it.

Where a pension is once allowed and paid to a widow on a finding by the Bureau that her husband, the soldier, died from the effects of a disability contracted in the military service and in line of duty, that finding can not be legally set aside unless positive, affirmative testimony is produced showing fraud, or that the testimony upon which the claim was allowed was in fact not true.

The testimony taken on special examination in 1897, 1898, and 1900, did not show fraud had been committed, nor did it affirmatively show that the testimony upon which the claim was allowed was not true. On the contrary, it supported the finding originally reached by the Bureau.

Assuming that Dr. Bundy falsified his accounts in connection with his duties in the Pension Bureau, it does not necessarily follow that he gave false testimony in this claim. On the contrary, his testimony given in 1897 before an examiner fourteen years after he made his affidavit, when he was 74 years old, given on the spur of the moment when suddenly called upon by the examiner, shows that he had personal knowledge of the matters to which he had testified. His testimony has substantial corroboration in the evidence given by other witnesses to the special examiner.

It is deemed unnecessary for the purposes of this decision to set forth the testimony of the several witnesses taken on special examination. The examiner whose report is above quoted fairly represented that testimony.

It is shown, and the Bureau admits, that when, on February 15, 1874, William C. Gray married claimant, he then had a wife living in

the city of St. Louis, Mo., from whom he had not been divorced. Claimant's marriage to him was therefore null and void, and she still remained the widow of the soldier, William H. Eveland.

All the testimony is to the effect that claimant is a hard-working woman of excellent character.

Under all the facts and circumstances in this case it is believed that the rejection of the claim for restoration for the reason stated was error. The action appealed from is therefore reversed, and the papers are herewith returned, with directions to readjudicate the claim in conformity with the views hereinabove expressed.

DIVISION OF PENSION—DESERTION—DECREE—RES JUDICATA.

BURDETTE *v.* BURDETTE, ALIAS OAKLEY.

Claimant having left her husband and the matrimonial domicile, it is incumbent upon her to show by satisfactory evidence that she was legally justified in her said separation in order to establish marital desertion on the part of the husband. Claimant having submitted her domestic controversy to the courts, she is bound by their judicial decisions therein, no appeal having been taken therefrom.

An unsworn petition can not be considered in the adjudication of claims for the division of pension under the act of March 3, 1899.

The evidence in this case fails to establish desertion on the part of pensioner, as the separation appears to have resulted from domestic discord and a mutual desire for separation.

Separation to constitute desertion must be against the will of the innocent party.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
August 31, 1903.*

George Burdette, alias Thomas Oakley, a pensioner under certificate No. 17442, appealed by his attorney, J. P. Lockwood, July 9, 1903, from the Bureau action of December 23, 1902, wherein the Bureau rejected his application for restoration of one-half of his pension allowed his wife, Barbara C., July 8, 1901, on the ground that he had deserted her, she being his lawful wife, of good moral character, and in necessitous circumstances.

It is contended, on behalf of pensioner in his said appeal, that the evidence shows that claimant deserted the pensioner; that she left him without just cause and immediately thereafter filed her application for divorce, which suit was subsequently dismissed; that the court in rendering a judgment of dismissal of her proceedings for divorce incorporated an additional provision for alimony while she lived away from her home, the condition being that the opportunity for her return was to be maintained, which condition has been complied with; that in her subsequent proceedings for contempt for nonpayment of alimony her petition was dismissed.

Claimant, in her answer to said appeal, admits that her bill for divorce was dismissed, but contends that the judge stated orally:

That he was satisfied the appellant had not treated his wife as a husband should, and also that his children had been guilty of rude and cruel conduct toward her, and the court was satisfied the same was done with his knowledge; that the court would dismiss the bill and thereby give him an opportunity of restoring his said wife to his home and treating her better in future than he had in the past; otherwise he would have to pay the sum of \$1.50 per week as alimony.

She admits that she filed a petition for contempt against the appellant in said court subsequent to the date of the decree passed therein because he did not pay her alimony as ordered, and alleges that at the hearing of her petition both sides placed witnesses on the stand; that the witnesses for the appellant mostly swore to the fact that he was unable to pay alimony, for the reason that he only made \$6 per week, and was greatly in debt to his landlord for house rent and also owed doctors' bills and medicine bill and had some minor children to support; that as she was unable to show that her husband was able to comply with the decree her petition was dismissed.

Claimant has also filed with her appeal a copy of a bill for divorce filed by her said husband October 6, 1902, and argues that as her said husband had failed to prosecute his suit for divorce, the allegations in his bill were untrue, as otherwise he would have received a divorce, and these proceedings "would not need to have been reviewed by the honorable Secretary of the Interior."

It appears from the evidence in the case that pensioner, a widower, aged 45, with two minor children, was married to claimant in Baltimore, Md., she being a spinster, aged 35 years, as appears from the marriage certificate; that they cohabitated as man and wife until September 13, 1899, when claimant separated from her said husband, since which time she has not returned or cohabitated with him. On the next day, September 14, 1899, pensioner advertised her as having deserted him, giving notice that he would not be responsible for any debts contracted by her. On September 19, 1899, six days after the separation, claimant filed her bill for divorce *a mensa et thoro* in the circuit court of the city of Baltimore, and an order for alimony pendente lite and counsel fees was issued, and subsequently made absolute. Issue was joined on answer and replication, testimony was taken, and on June 20, 1900, the court, by Hon. Pere L. Wickes, rendered the following decree:

In the circuit court of Baltimore city.

BARBARA BURDETTE v. GEORGE BURDETTE.

This cause having been set down for hearing the arguments of counsel, the proceedings, and the testimony having been read and duly considered by the court.

It is, therefore, this 20th day of June, 1900, by the circuit court of Baltimore city, adjudged, ordered, and decreed that the bill of complaint for a decree of divorce

"a mensa et thoro" exhibited against the defendant, George Burdette, is hereby dismissed.

And it is further adjudged, ordered, and decreed that the defendant, George Burdette, pay unto the complainant, Barbara Burdette, the sum of \$1.50 each and every week as and for maintenance support, and accounting from the 20th day of June, 1900, and to continue the said weekly payments until the defendant, George Burdette, is ready and willing to receive the complainant, Barbara Burdette, into his domicile, and there to maintain and support the said Barbara Burdette according to his rank and station in life, and to make her life more comfortable in the future by avoiding, as far as he is able to do so, the rudeness and abuse of which she complains, and in the event and failure of the said Barbara Burdette refusing to return to the defendant's domicile, then the weekly payment of the aforesaid sum of money, payable by the defendant to the complainant, shall forthwith cease.

And it is also further ordered and decreed that the defendant pay the costs of these proceedings.

Claimant subsequently filed her petition in said court, praying that her said husband be punished for contempt for nonpayment of alimony and counsel fee, and on April 14, 1902, the court, by the Hon. Henry Stockbridge, judge, rendered the following order of dismissal:

In the circuit court of Baltimore city.

BARBARA BURDETTE v. GEORGE BURDETTE.

The petition for contempt of this honorable court for nonpayment of alimony et counsel fee having been set for hearing, the arguments of counsel, the testimony having been heard, and duly considered by the court,

It is therefore, this 14th day of April, 1902, by the circuit court of Baltimore city, adjudged, ordered, and decreed that the petition of contempt of this honorable court is hereby dismissed.

Where a bill is dismissed upon the hearing the presumption is that there was a final determination of the cause, Fletcher's Equity Pleading and Practice, p. 714 and note 87. An unconditional dismissal of a bill, especially at the hearing after issue joined, is a final decree. Ibid., 591 and note 93.

As stated by the same author at page 589:

There is no instance in which a court has reinstated a bill which has been regularly dismissed for the mere purpose of agitating the question of costs.

The court in dismissing claimant's bill at the hearing must have necessarily found against her upon the material issues in the case, which were her right to a separate maintenance and alimony. These issues were, in turn, dependent upon the question as to which party was responsible for the separation.

It is true that the court in the same decree dismissing the bill at the final hearing assumed to award the wife alimony from the date of the decree in case the husband refused to receive her at his home as his wife and support her "according to his rank and station in life," and in case of her failure to return to his domicile her alimony was to cease. Her right to alimony prior to June 20, 1900, was denied her

by Judge Wickes in the dismissal of her bill and her right to alimony for the future was made dependent upon the future conduct of the parties.

The question of her right to alimony was presented to the court by her petition for an attachment against her husband for contempt, by reason of his failure to pay alimony under the first decree, and the court, by dismissing her said petition at the hearing and after issue joined, and after the hearing of testimony and arguments of counsel, denied her right to alimony. The question of legality of so much of the final decree dismissing her bill, as awards her alimony conditionally, does not appear to have been raised or questioned by the court in passing upon and dismissing her said petition. The legal effect of the second decree was to hold that she had not shown herself entitled to a divorce *a mensa et thoro*, or to alimony; that she was not the innocent or injured party, and that her husband was not solely responsible for the separation. This dismissal of her petition, like the dismissal of her bill, was a final decree, and no appeal has been taken therefrom.

Claimant having left her husband and the matrimonial domicile, it is incumbent upon her to show, by satisfactory evidence, that she was legally justified in her said separation in order to establish marital desertion on the part of her husband.

Having submitted her domestic controversy to the courts, she is bound by their judicial determination thereof, no appeal having been taken therefrom.

In her testimony in this case claimant has wholly failed to allege or prove a single act of cruelty or neglect on the part of her husband to justify her in leaving him. The strongest evidence on that point offered by claimant is to the effect that after she had left his house, in accordance with her previous threats, he sent word to her to remove her things out of his house, and that he would advertise her in the papers. This might or might not constitute cruelty, but the conduct of both parties indicates that, whatever may have been the original cause of their misunderstandings and separation, their desire for separation was mutual.

Evidently realizing the weakness of the testimony in her behalf, claimant appears to have attempted to supply the defect and strengthen her case by an unsworn petition, signed by twenty-four petitioners, wherein they recite that:

We, the undersigned, hearing of an effort upon the part of one George Burdette to deprive his wife of one-half his pension, and that in furtherance of his case he alleges that his wife, Barbara C. Burdette, left his home of her own volition, we beg, respectively, to say that many of us, whose names are hereunto appended, have known Mrs. Burdette from childhood, and are acquainted with her case. We unhesitatingly pronounce any such charge or charges on the part of her husband as false and without any foundation.

It seems hardly necessary to state that this is not evidence to be considered in the determination of claimant's right under the act of March 3, 1899, and no mention would be made of this petition but for the fact that it is found, bound with the evidence and attached to the face brief in the case, and may be presumed to have been considered, together with the legitimate testimony and proofs in the case.

Claims under the act of March 3, 1899, are in the nature of a suit at law where the question of title to money is at issue. The claimant is required to establish her claim by competent and satisfactory evidence, and an unsworn petition is not such evidence and should not be considered. If the claimant be allowed to support her claim by such a petition, the pensioner should be entitled to the same right as to his defense, and the one furnishing the strongest petition be allowed to prevail. Such a practice would only tend to confusion, is unauthorized, and should not be countenanced or permitted.

The Department is of the opinion that the evidence in this case fails to establish desertion on the part of the pensioner within the meaning of the act of March 3, 1899, as the separation appears to have resulted from mutual disagreements and a mutual desire for separation. So far as the evidence shows, the claimant has made no effort to secure a reconciliation, but tends to show that pensioner requested his wife to return to him. Mere separation does not constitute desertion, but the separation must be against the will or consent of the innocent party. *Whitney v. Whitney* (13 P. D., 301); *Crume v. Crume* (*Ibid.*, 424-427).

In questions of desertion the intention of the persons absenting themselves has a large, if not controlling influence. *Kennedy v. Kennedy* (87 Ill., 250).

As claimant has failed to establish desertion, the action appealed from, refusing to reopen the case and to restore to pensioner his full pension from March 4, 1902, the date of filing his application therefor, is reversed.

DIVISION OF PENSION—PRACTICE—SPECIAL EXAMINERS.

BUCK *v.* BUCK.

Pensioner's sole assignment of error in his appeal is that the special examiner failed and refused to take the depositions of his eleven impeaching witnesses.

Held, That said assignment is defective in that it fails to show that any application had been made to the Commissioner of Pensions for an examination of said witnesses, and refused by the Commissioner, and for the further reason that the appeal fails to allege that the testimony of the witnesses, sought to be impeached, was untrue.

Appellant alleged no error before the special examiner, and took no exceptions to his rulings, and the question as to whether the examiner properly exercised his discretion in conducting the examination can not, against the objection of appellee, be permitted to be first raised on appeal.

Neither claimant nor pensioner, in claims under the act of March 3, 1899, is entitled, as a legal right, to the services of a special examiner.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
August 31, 1903.*

John Buck, a pensioner under certificate No. 580496, appealed July 8, 1903, from the Bureau action of June 2, 1903, allowing the claim of his wife, Emaline, filed June 24, 1902, for one-half his pension, on the ground that he had deserted her, she being of good moral character and in necessitous circumstances.

Pensioner, by his attorney, John T. Parson, contends in his appeal that the special examiner "failed and refused to take the depositions of 11 of appellant's most important witnesses," naming them; "that the evidence of these 11 witnesses, who are some of the most reliable citizens in Hancock County, will impeach the evidence of the witnesses of appellee. Wherefore appellant prays that the error of fact be corrected, and for all proper relief."

Claimant, by her attorney, Eugene C. Vance, in answer to said appeal, contends—

First. It is not stated in what particular the evidence of any witness for the appellee would be impeached by any of the witnesses whose depositions were not taken, nor is it averred that any of the testimony given by any of appellee's witnesses is not true.

Second. That the action and recommendations of a sworn officer of the United States who is an impartial trier of the truth of given facts should not be set aside upon the bald statements of a party interested in the case.

Third. The action of the Hancock circuit court ordering appellant to pay appellee maintenance pending the trial of the divorce case between the parties, and his failure to do this, his desertion of her in her old age, making no provision for her support, should appeal with resistless force to the Department.

Pensioner's sole assignment of error in his said appeal is that the special examiner who conducted the examination in this case failed and refused to take the depositions of eleven of his impeaching witnesses.

The Department is of the opinion that said assignment is fatally defective, as it fails to show or allege that any application had been made to the Commissioner of Pensions for a special examination of said witnesses, and denied by the Commissioner; and for the further reason that the appeal fails to allege that the testimony of the witnesses sought to be impeached was untrue or unreliable.

The pensioner alleged no error before the special examiner and took no exceptions to his rulings, and the question as to whether the examiner properly exercised his discretion in conducting the examination can not, against the objection of claimant, be permitted to be first raised on appeal.

Neither the claimant nor pensioner in claims under the act of March 3, 1899, is entitled, as a legal right, to the services of a special examiner. Both claimant and pensioner are required, under the rules, to establish their cause and defense by satisfactory testimony and at their own expense.

The question as to whether a special examination should be had in any case is one resting in the sound discretion of the Commissioner of Pensions, the object being to protect the Bureau against claims which are not genuine and to obtain the facts when the best obtainable *ex parte* testimony furnished leaves the Bureau in doubt as to the right of the cause.

As stated in paragraph 5, page 79, Treatise on the Practice of the Pension Bureau, of 1898,

The duties of a special examiner are delicate and important; he is charged with the protection of the interests of the Government and the rights of the claimant; he is not in any sense the attorney of either; his mission in all cases is to obtain the real facts, and, without bias or prejudice, for or against either party in interest, report the same to the Commissioner.

As provided by the pension laws, the examiner's duty is to administer oaths and take affidavits, and in the exercise of these powers he is required by the practice to exercise intelligent judgment and discretion; to avoid the taking of irrelevant or immaterial testimony, consuming unnecessary time and causing additional expense.

Attorney for appellant argues in his brief as an additional reason why the Bureau action should be reopened and the case further specially examined, that he was prevented from representing his client before the examiner by reason of the examiner's failure to keep his appointment on the date specified in the notice.

It appears that the special examiner appeared at the time and place specified in the notice, and proceeded to take the testimony of claimant, which was afterwards read to pensioner's attorney, who took no exceptions and made no complaint.

No affidavit of merits accompany the appeal nor is it alleged that the Bureau erred in allowing the claim. The appeal contains no such specific assignments of error on the part of the Bureau as is contemplated by Rule 19 of Practice. *Sheldon v. Sheldon* (13 P. D., 542).

After a careful consideration of all the voluminous testimony in this case, including that of some seventeen witnesses on the part of the appellant, before the special examiner, the Department is of the opinion that the Bureau action appealed from was fully justified, and said action is accordingly affirmed.

REIMBURSEMENT—MISTAKE—ACCRUED PENSION.

JAMES CALHOUN (DECEASED).

Where a pensioner's name is dropped from the rolls under the act of June 27, 1890, and payments of pension are continued through error on the part of a pension agent, the Government may reimburse itself for the money so paid out of the accrued pension in claim in behalf of said pensioner for renewal of pension under said act.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, July 31, 1903.

Certificate issued August 15, 1892, to allow pension, under the act of June 27, 1890, at \$6 per month, to James Calhoun, who served in Company B, Seventeenth United States Colored Volunteer Infantry. Approval was made June 12, 1894, for dropping, on the ground that the soldier was not ratably disabled for earning a support by manual labor, and pursuant to such action the United States pension agent at Knoxville, Tenn., was directed to drop his name from the rolls, and his name was so dropped April 18, 1895. However, payments of pension money were made through error by this agent to the soldier to May 4, 1897, the erroneous payments to him amounting to \$162.

In soldier's behalf there was filed, June 3, 1901, a declaration for renewal of pension under the act of June 27, 1890, from which date certificate issued December 4, 1902, to allow pension in the claim at \$12 per month to September 4, 1901, date of soldier's death, payable to soldier's widow, Ada Calhoun. The entire amount of accrued pension was withheld to reimburse the Government for erroneous payments of pension made to the soldier as above set forth.

An appeal was entered March 23, 1903, with the contention that as alleged overpayment to the soldier was made without fraud or misrepresentation upon his part and was wholly due to a clerical error on the part of the agent in failing to comply with instructions to drop the name of the soldier from the rolls, accruing payments of pension can not be withheld to reimburse for said overpayment.

It is well settled that pension money can be withheld to reimburse the Government for money paid as pension through fraud perpetrated by a claimant, or through mistake of fact from clerical error in fixing rate of pension or in making payment thereof. (See Assistant Attorney-General Shields, 6 P. D., 297 et seq., and opinions and cases there cited.) It is not necessary to discuss the legal proposition involved, as no argument is submitted or citation of authorities made in this appeal in any way contesting the correctness thereof.

When there have been payments of pension made pursuant to an erroneous judgment in the application of the law to the facts in a case, there is no ruling of the Pension Bureau, or decision of the Department, or opinion of any officer of the Government, to which attention has been called, to warrant the withholding of pension money to which a claimant is entitled, to reimburse the Government for any overpayment due to error of judgment in the particular noted. The cases cited in the appeal, viz, C. F. Knoop (8 P. D., 435), Joseph P. Wilson (11 P. D., 308), John La Mountain (11 P. D., 395), are in full accord with this view of the law.

The material facts in this case in all essential particulars bring the

question at issue within the rule laid down in the case of Pension Agent Clements (5 P. D., 328), which, in substance, is that the Government may withhold payment of pension until it is reimbursed for any overpayment of pension made by a pension agent through clerical error on his part. There is a difference in fact in the two cases, in a minor particular, viz, that in the cited case the payments of pension were made by the pension agent when there were instructions from the Bureau to him to pay some rate of pension, and in the present case no such instructions existed while the agent was making payment of the pension for which the payment of accrued pension is withheld to reimburse the Government. But it is quite apparent that the errors in each instance were clerical, were mere oversights, the one on the part of a clerk in your Bureau and the other on the part of a clerk in the office of the pension agent. Upon whosoever part the error was made, no title thereby passed to the person to whom the pension was paid, whether or not the payment was made by the pension agent pursuant to instructions of the Bureau or through error committed in his office. In neither event was there any decision of the tribunal to whom the construction of the laws was confided by the Government, to the effect that the claimant was entitled to the respective sum in question. So, from a legal aspect, the payment in each instance rests upon the same ground and the claimant's title in each case is to be determined by the same test.

It is true that there is no statute specifically authorizing the withholding of pension to reimburse the Government for money paid to a person to which he is not entitled under the law in instances where the right of the Government at common law to reimburse itself is undoubted. (See Attorney-General Legare, 4 Op., 70, quoted in 6 P. D., 298.) Probably because of the absence of such statute the right of the Government in these instances is, from time to time, disputed by claimants. However, it is not deemed necessary to further discuss a proposition as to which as yet no citation of authority has ever been made tending to show that it is not sound.

The appeal in this case is entered by W. W. Dudley Company, of Washington, D. C., in behalf of the widow. Therein they state that they also appeal from the action of the Bureau of April 18, 1895, in dropping the soldier's name from the rolls. An inspection of the papers in the case fails to disclose any authority from the widow of the soldier to said attorneys to appeal in behalf of the claimant for restoration of pension in the claim filed by the soldier, and therefore the appeal from said action can not be entertained.

The action of the Bureau in withholding pension to reimburse the Government is affirmed.

INCREASE—ACT OF JANUARY 29, 1887—ARREARS.

GARRY W. LYNCH.

When a pensioner under the act of January 29, 1887, was allowed increase, under the act of January 5, 1893, from a date which was subsequently decided by the Department to have been erroneous in law, and he, pursuant to such decision, applies for arrears of increase from the proper date, as so decided by the Department, which was prior to that from which he was allowed such increase, and shows the existence, at the former date, of the same conditions in fact as to title to increase as existed at the latter date, such arrears should be allowed, notwithstanding such conditions do not, in the opinion of the present adjudicating officer, establish such title, the question being one of judgment, merely, on the evidence.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, September 23, 1903.

This appellant, Garry W. Lynch, of Capt. William B. Walton's company, First Tennessee Volunteers, Mexican war, was allowed pension, certificate No. 6816, in June, 1887, under the act of January 29, 1887; and in April, 1894, the rate of pension was increased, under the act of January 5, 1893, to \$12 per month from April 4, 1894; the date of commencement of increase being, in accordance with Order 231, that "on which the case is legally approved for admission by the board of review."

On June 8, 1901, the Department, in the case of Robert Markwood (11 P. D., 380), disapproved and abrogated said Order 231, and promulgated the rule that increase of pension under said act of January 5, 1893—

Should be made to commence from the date subsequent to the date of approval of the act granting said increase, at which it shall have been established by the proof that the conditions of disability and destitution existed which are designated in said act as entitling such pensioners to the increase of pension therein provided.

Pursuant to that decision, this appellant, on September 21, 1901, filed a declaration claiming arrears of increase from date of filing his claim for increase on January 26, 1893; but such claim for arrears was rejected December 30, 1901, on the ground that he was not, prior to April 4, 1894—date from which his pension was increased, as aforesaid—in such destitute circumstances that \$8 per month were insufficient to provide him the necessaries of life; and he appealed September 8, 1903, contending that his rejection is erroneous because based upon the same evidence alone as that upon which he was allowed increase in April, 1894, and that such evidence shows that he was in such destitute circumstances prior to April 4, 1894, and since January 26, 1893, as subsequent to April 4, 1894.

This case presents a question somewhat similar to that in the case of William Wilson (10 P. D., 232), wherein it was held that when a pensioner was placed upon the rolls under a construction of law which is

afterwards receded from, and a contrary construction given to the law which would defeat his title were he a claimant thereafter, but he is retained nevertheless upon the rolls, he is entitled to increase of rating upon a proper showing of increase of disability for which pensioned, the same as if he were upon the rolls under the later construction of the law.

It is noted also in that decision that former ratings have been changed only when there was positive evidence that a mistake, either of law or of fact, had been made, "and not upon a mere question of judgment."

In this case the question of title to increase under said act of January 5, 1893, is one of judgment, merely, on the evidence, and the finding that such title is shown herein being allowed to stand, and the appellant continued upon the increase rolls, it would be not only inconsistent but contrary to law to deny him such increase from the only date when it may lawfully commence, as held in said Markwood decision, the same testimony which was held to show title to increase showing also that the same conditions in fact thus held as showing such title existed at date of filing the claim for increase as at the date from which increase was already allowed.

The commencement of increase herein from April 4, 1894, was a mistake of law, which the claimant is entitled to have corrected. The allowance of increase at all may also have been a mistake, but if it was such it was one of judgment, merely, which, under the settled rulings of the Department, should not now be disturbed.

The action appealed from is reversed, and you will allow increase accordingly from date of filing claim, January 26, 1893, to April 4, 1894.

MARRIAGE—COLORED PERSONS—EVIDENCE—PRESUMPTIONS.

CHARLOTTE GAMBLE (WIDOW).

The proof of the due and formal celebration, in the State of Texas, of the marriage of this claimant, an African or of African blood, to the soldier herein raises the presumption that he also was an African or of African blood, the statutes of that State making miscegenation a criminal offense, and prima facie establishes the validity of their marriage, which is not overcome by the evidence herein tending to show he was not of such blood.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
September 23, 1903.*

This appellant, Charlotte Gamble, on October 23, 1890, and January 19, 1891, filed her declaration claiming pension under, respectively, the act of June 27, 1890, and the Revised Statutes, as widow of Samuel Gamble, who was a member of Company H, Eighth Illi-

nois Infantry, from January 25, 1861, to November 16, 1865, and who died January 30, 1883.

Said claims (No. 481900) were rejected in January, 1893, on the ground she is not the soldier's "legal widow," and on March 9, 1901, she appealed, contending that "the mere fact of her legal marriage to Samuel Gamble in July, 1865, put an end to the relations previously existing between her and the man with whom she formerly cohabited" as a slave, who left her to enlist July 28, 1863, in Company C, Eighty-sixth U. S. Colored Infantry, and who was discharged April 10, 1866.

On October 31, 1902, the papers were returned for further action and report, the Bureau having receded from the rejection of the claim, and they are now retransmitted, with report showing rerejection August 31, 1903, on the ground that "claimant is not the legal widow of the soldier, her marriage to him having been in contravention of the law of Texas, and was illegal and void," the law referred to being the act of June 5, 1837, article 4670, Paschal's Annotated Digest of the Laws of Texas, providing that—

it shall not be lawful for any person of European blood, or their descendants, to intermarry with Africans or the descendants of Africans, and should any person as aforesaid violate the provisions of this section, such marriage shall be null and void, and the parties on conviction shall be deemed guilty of high misdemeanor and punished as such.

This case rests upon the decision of the question of fact whether the soldier Samuel Gamble was of European blood or descent. The alleged first marriage of claimant with one Harrison Wade appears to have constituted no legal barrier to her marriage with said Gamble, as it was a slave marriage only, dissoluble during slavery by a permanent separation merely, and in fact terminated as a matrimonial relation when he left her in 1863, never returning to her and never being heard of after his discharge.

While she would not, therefore, have any pensionable status as said Wade's widow, even under section 4705 of the Revised Statutes, as they did not cohabit up to his death, as specifically required by that section, she would nevertheless appear to have such status under said section as the widow of said Gamble, the soldier herein, provided he were a "colored soldier," as that section by its express terms applies only to "the widows of colored * * * soldiers."

Said section, however, has been held to have no application to claims under the act of June 27, 1890, which are determinable, as to questions of marriage, by the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued (act of August 7, 1882.)

It is apparent, therefore, as above stated, that the sole question to be decided in this case, to determine this claimant's pensionable status under either claim, is the one of fact whether this soldier, Gamble, was of or descended of European blood.

His life prior to his enlistment appears to be entirely unknown except that he was born in Ohio. No trace whatever of his family or ancestry could be secured on special examination. He was a member of a white Illinois regiment, and was supposed by his comrades to have been a white man, having a fair complexion, blue eyes, and light hair, but thick lips. No question appears then to have been raised as to his race or blood. When the regiment arrived in Texas in 1865, however, he associated with this claimant, an African or of African descent, told her he had negro blood in his veins, married her, as shown by original certificate of marriage, and thereafter associated with colored people in Texas and in Louisiana the remainder of his life.

This soldier must be presumed to have acted innocently in thus marrying this claimant in the face of a law making miscegenation a crime and declaring such a marriage null and void. The legal presumption is that he was of African descent. Any other assumption would involve the presumption of his criminal guilt. However, "as men do not generally violate the penal code, the law presumes every man innocent" (1 Greenleaf on Ev., sec. 34); and "this presumption is so strong, that even where the guilt can be established only by proving a negative, that negative must, in most cases, be proved." (Ibid., sec. 35.)

Furthermore—

Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality, not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void." (1 Bishop on Mar., Div., and Sep., sec. 956.)

If the celebration of a marriage be proved, the contract, the capacity of the parties, in fact, the validity of the marriage, is presumed. (Stewart on Mar. and Div., sec. 125.)

And where a criminal offense is in issue in a civil action, the proof thereof must be, in some States, beyond a reasonable doubt, in others, by only a preponderance of testimony, but must "in all cases be full, clear, and satisfactory, and the graver the offense charged the stricter is the proof required." (Ibid., sec. 345.)

The true rule in such cases appears, however, to be, as stated by Wharton (2 Wharton on Ev., sec. 1245), that—

In civil issues the presumption of innocence in cases where it is applicable is not technically evidential, but it is of value only so far as it affects the burden of proof.

But in pension claims the burden of proof is, throughout the adjudication of the claim upon the claimant alone to establish his or her title to pension, and it does not shift at any time to the Government. (Mary J. Gilliland, 13 P. D., 90; Diana M. Dana, *ibid.*, 272.)

When, therefore, a claimant as widow has shown a duly celebrated marriage to the soldier on whose account she claims pension, she has *prima facie* established a valid marriage to him, and it should be held to have been valid unless the evidence in the case shows fully, clearly, and satisfactorily that it was invalid. There should be at least a preponderance of testimony to the effect that it was invalid.

In this case there is nothing whatever tending to show the soldier Gamble was a white man except his general appearance and the fact that he belonged to a white regiment; while on the other hand he had thick lips, a characteristic of the African race, married a colored woman, to whom he claimed he was of African blood, marrying under a statute which made such marriage, if he was a white person, a criminal offense, and associated for eighteen years with colored people.

When the proof as to a fact which is, under the presumption of innocence, *prima facie* established is thus balanced the fact is taken as satisfactorily proved. (2 Wharton on Ev., sec. 1245.)

The supreme court of Texas has given great weight to the presumption of innocence as applied to marriages. In the case of *Carroll v. Carroll*, 20 Tex., 732, that court upheld a second marriage upon the presumption of the parties' innocence, and stated that the presumption was not overcome by the evidence of children of the first marriage that they never heard their parents say they were divorced, nor by that of another witness that the first wife believed when she remarried that her first husband was dead.

This evidence, they say, ought not to prevail against a presumption operating with such constraining force and supported by such strong considerations of public policy. (Citing, 1 Bishop on Mar., sec. 459; *Lockhart v. White*, 18 Tex., 102; *Yates v. Houston*, 3 Tex., 433.)

In *Lockhart v. White*, supra, the court stated:

The law presumes a continuance of life, yet where this presumption necessarily involves a presumption of crime, and comes in conflict with the presumption of innocence, the former, which is the weaker, yields to the latter presumption, and a party affirming an individual is not dead will be bound to prove it.

This claimant therefore should be held to have satisfactorily shown a valid marriage to the soldier on whose account she claims pension herein. Rejection is reversed accordingly.

DIVISION OF PENSION—DESERTION—EVIDENCE.

KENDELL *v.* KENDELL.

The husband, having deserted his wife, can not, by offering her a home elsewhere (which he does not possess), constitute her the deserter merely because she refuses to follow him.

The evidence in this case fairly shows that pensioner deserted his wife, and that she is legally justified in refusing to renew the suspended marital relations.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
September 23, 1903.*

William T. Kendell, a pensioner at \$8 per month, under certificate No. 952461, appealed August 10, 1903, from the Bureau action of June 25, 1903, allowing the claim of his wife, Rebecca F., filed July 30, 1902, for one half his pension and holding that "pensioner deserted claimant, his lawful wife, who is a person of good moral character and in necessitous circumstances."

Pensioner contends in his said appeal that the Bureau erred in not taking all the facts into consideration, and that he had established the fact that he had not deserted his wife, but had sent her money on different occasions and a money order for her transportation to Philadelphia, where he proposed giving her a home; that she accepted this money, but refused his offer of a home, and that she is thereby the deserter. He further contends as follows:

Under the laws of the State of Pennsylvania, a wife is bound to cohabit with her husband, and if he offers her a home in good faith she is bound to follow the domicile provided for her by him. She is not excused by reason of prejudice against a certain location, leaving relatives, or any other personal whim.

I hold that my offers to provide her a home and sending her money at different times relieve me of the charge of desertion and place her in a state of technical desertion.

Claimant, in her answer to said appeal, alleges that she has no faith in anything her said husband says or does, and that her only feeling toward him is one of loathing and disgust.

It appears from the evidence that claimant and pensioner were married in Bucks County, Pa., October 4, 1860; that after several separations, in which the pensioner appears to have been the party at fault, they finally separated May 15, 1899, and have not since lived together as husband and wife. The evidence further shows that pensioner's treatment of his wife was cruel and abusive; that he neglected her and his family, frequently moving them from place to place without providing for them a suitable or comfortable home, such as his ability and circumstances would warrant; that he was unfaithful to his wife, and that when he left her in May, 1899, at Scranton, Pa., he went to Philadelphia, taking with him another woman; that previous to their separation he was a locomotive engineer, earning about \$100 per month, and was discharged from the Brotherhood of Locomotive Engineers March 11, 1899, because of "living with a lewd woman;" that since going to Philadelphia he sent her at one time \$1 and at another time \$2, but, as testified to by two witnesses, the whole amount sent claimant did not amount to \$5. It appears from his testimony, however, that after claimant had filed her application for one half his pension under the act of March 3, 1899, he sent her a post-office order for \$5, with an invitation to come to him from Fleetville, Pa., where claimant is now residing, to Philadelphia, where he offered her a home, promising her that she should find him "a dif-

ferent man now;" that he would have a place for her till such time as he could send for her goods. It appears, however, that claimant had previously been imposed upon by pensioner and had joined him at Philadelphia, when she was subjected to abject poverty and distress by reason of his neglect, and that at the time he offered her a home, June 9, 1903, he had no home to offer, but simply contemplated securing one in the future.

Claimant is shown to be a woman of good moral character and in necessitous circumstances.

A wife, deserted by her husband, is entitled to her own domicile. 5 Am. and Eng. Ency. of Law (1st ed.), 756, and notes 4, 5, and 6, and page 754. 9 Ibid. (2d ed.), 736, and note 5. *Colvin v. Reed* (55 Pa. State Reports, 375); *Williamsport v. Eldred* (84 Pa., State Rep., 429-432); *Cheever v. Wilson* (6 D. C., 149).

In the case last above cited the law upon this question, especially in the State of Pennsylvania, was clearly and concisely stated by Chief Justice Agnew, who delivered the opinion of the court in 1877, as follows:

By the second section of the act of May 4, 1855, "Whosoever any husband, from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a femme sole trader under the act of February, 22, 1718, * * * and her property, real and personal, however acquired, shall be subject to her free and absolute disposal during life, or by will, without any liability to be interfered with or obtained by her husband; and in case of her intestacy shall go to her next of kin as if he were previously dead." So the third section of the act of April 11, 1856, declares that "Whosoever any husband shall have deserted or separated himself from his wife, or neglected or refused to support her, or she shall have been divorced from his bed and board, it shall be lawful for her to protect her reputation by an action for slander or libel; and she shall also have the right, by action, to recover her separate earnings or property." *Black v. Tricker* (9 P. F. Smith, 13) decides that the conduct of the husband * * * establishes her rights ipso facto. In reference to the second section of the act of 1855, Chief Justice Thompson said: "The section was designed to suspend the marital rights of the husband as a consequence of the acts enumerated, and at the same time relieve the wife from her marital disabilities." * * * This suspension of marital rights of the husband and the power to trade, earn property, defend it, and keep it to herself and children, unite in enabling her to secure a place of business and a home, and thereby to obtain a settlement as the necessary consequence of her legal rights.

In *Colvin v. Reed* (supra) the court held that—

Where the injured party seeks a new domicile, and the domiciles are, therefore, actually different, there is no greater reason why the husband's new domicile should prevail over the wife's than hers over his.

In the case of *Hultz v. Gibbs* (66 Pa. St. Rep., 360) the court held that—

When a husband without reasonable cause forces his wife to withdraw from him, without any means of support, the law implies that he has given her credit to supply herself with such necessaries as are suitable for her, namely, clothing, boarding, lodging, and the like.

The question of the wife's right to her separate domicile where her husband had deserted her was under consideration by this Department in the case of *Pierce v. Pierce* (12 P. D., 412), wherein the Department held that—

While the law recognizes the right of the husband to fix the domicile, and requires the wife to follow the husband under penalty of being considered the deserter in case she refuses, yet he can not exercise this power arbitrarily, but with reason and discretion. He is, therefore, required to show reasonable cause why his wife should follow him when he changes his abode. * * *

The refusal of the wife to follow her husband, who had deserted her, to another State, and leave her home upon the mere offer of her husband to provide a home for her, does not necessarily constitute her the deserter. Citing Schouler's *Domestic Relations* (3d ed., par. 38) and several State authorities.

Pensioner having deserted his wife, his legal duty is to rejoin her at her home, and he can not, by offering her a home elsewhere, which he does not possess, constitute her the deserter merely because of her refusal to follow him, the cause of the separation having been such as would entitle her to a divorce under the laws of Pennsylvania.

The Bureau action appealed from appears to have been in accordance with the evidence in this case and the laws applicable thereto. Said action is accordingly affirmed.

PRACTICE—RATE—BRIEF—FACE—COMBINED RATES.

WILLIAM HANLEY.

In 1887, at a time when the soldier was pensioned for "gunshot wounds of left leg and right thigh," he filed a claim for increase on account of additional disabilities, namely, "disease of eyes and disease of spine." Pursuant to these allegations, additional pension for "disease of back (lumbago)" at \$2 per month, and for "disease of eyes" at \$4, \$8, and \$17, respectively, per month was allowed. The combined rates, however, did not exceed \$17 per month.

Fractional rates can not be added together so as to make a grade rate, and the aggregate degree of disability shown to be due to all pensioned causes was not equivalent to the loss of a hand or foot, for purposes of manual labor; consequently the third-grade rate was not allowed.

Although the term "disease of eyes" is not so indefinite as are such terms as "disease of spine," "disease of head," "disease of back," etc., the visual organs and their appendages are, nevertheless, subject to so large a number and such an infinite variety of diseases, accidents, and other abnormal conditions that it is desirable that all approvals for pension—both legal and medical, especially the latter—hereafter spread on the brief-face in each and every case wherein such questions are involved shall indicate as clearly as possible the nature of the disease, lesion, or condition accepted as of service origin; but inasmuch as this suggestion is in the nature of a new departure from prevailing methods, the propriety of complying therewith is, at this time, merely suggested for the careful consideration of the Bureau, the action of which in other respects in this case, especially in regard to the adequacy of the existing rate, is approved.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
September 25, 1903.*

On July 31, 1901, the following opinion was promulgated in the case at bar:

William Hanley, late of Company D, Fifteenth Indiana Volunteer Infantry, enlisted as a private in said organization June 14, 1861, and was discharged therefrom June 24, 1864.

He was in receipt of a pension at the rate of \$17 per month since June 18, 1890, the pension being for gunshot wound of left leg and right thigh, disease of back (lumbago), and disease of eyes.

April 3, 1897, he applied for an increase, alleging pensioned cause; that his gunshot wound of left leg or ankle has resulted in partial paralysis of that limb; that the disease of eyes has increased to the extent that he is unable to see any at night, and sunlight produces blindness; that the disabilities are equivalent to loss of arm at elbow; that his lumbago prevents his stooping over or any exertion when trying to work.

He was medically examined by the board of surgeons at Lafayette, Ind., October 20, 1897, and by a specialist in eye diseases at same place June 18, 1898, and by another specialist in eye diseases at Indianapolis, Ind., August 3, 1898.

May 21, 1898, his claim was approved for gunshot wound of left leg and right thigh, disease of back, and disease of eyes. A rating of \$17 per month was allowed therefor, his claim for increase being rejected; that paralysis of left leg was not shown to exist, and that any lameness of right leg due to pensioned cause is covered by approval and rate.

March 4, 1899, he appealed upon the following ground: That the board of surgeons at Lafayette was not fair in their examination, and the report of said board was unjust to him; that the examination made by the specialist, Doctor Thompson, August 3, 1898 (soldier probably means Dr. Joseph O. Stillson), was unfair and unjust; that the doctor was prejudiced in said examination, and charged said disease of eyes to causes which are untrue in each and every particular, viz: To use of intoxicants and tobacco; that he uses no liquors of any descriptions, and so advised said physician; that he never uses tobacco except for chewing and then moderately; that the said physician is prejudiced against all claims of this character, and appellant presumes that the rejection of his claim was due to the adverse reports of the specialist and the board at Lafayette.

In view of these facts appellant asks a reversal of the action complained of, etc.

There is nothing to indicate that the board at Lafayette or Doctor Stillson treated the soldier unfairly; on the contrary, the board at Lafayette, after a full description of soldier's disabilities, recommended a rating of \$24 per month, and the specialist, Doctor Stillson, whom soldier charges with prejudice and injustice, made a very clear and comprehensive report. Doctor Stillson does not state that the soldier had aggravated his eye trouble by the use of intoxicants, but does state that soldier admitted excessive use of tobacco, and thought that it hurt his eyes. From this statement made by the soldier Doctor Stillson expressed the opinion that if the soldier would discontinue the use of tobacco his diseased eyes would improve.

The soldier is therefore mistaken when he states that he received unfair treatment at the hands of the board of surgeons and Specialist Stillson.

It will be observed that soldier's disease of eyes has been accepted as of service origin, and his rating is in part made up for that disability; it is not true, as soldier states, that his disease of eyes has been adjudged to be the result of the use of intoxicants or tobacco.

Inasmuch as the appeal herein is based upon alleged unjust treatment by the board

of surgeons and the specialist, and since, as before observed, soldier is mistaken in his assumptions, it is deemed unnecessary to quote the certificate referred to; suffice it to say that from the descriptions given by the board and by the specialist of soldier's condition it would seem that his present rating, \$17 per month, is fully commensurate with his degree of disability from all causes legally accepted as of service origin.

Notwithstanding the fact that the foregoing departmental decision demonstrated quite clearly the error of the contentions of the appellant, as therein set out and considered, and showed with equal clearness that the existing rate in the case was fully commensurate with the degree of disability manifested as a result of all causes accepted as of service origin, the soldier, upon the receipt thereof, proceeded to file another claim for increase, wherein he alleged that he was wholly incapacitated for the performance of any and all manual labor by reason of the causes of disability for which he was pensioned.

The said new application for increase was filed August 29, 1901, and he was examined thereunder March 31, 1902, by an expert examining surgeon (an oculist), but the said expert did not confine his examination to the diseased eyes alone—all the other pensioned causes of disability having been considered in such examination, as his following report will show:

The eyelids are normal. There is a chronic conjunctivitis. There is no trachoma, blepharitis, or pterygium. No trichiasis, ectropion, or entropion.

The cornea is transparent.

The pupils are of average normal size and respond readily to light. There are no synechiæ, but the pupil dilates very slowly and incompletely under a mydriatic. The fields of vision are very small. The color sense is not acute.

Ophthalmoscopic examination shows atrophy of the optic nerve.

V=O. D. $4/100 + 7.00$ gives 20/70.

O. S. $4/100 + 6.00$ gives 20/70.

Reading. O. U. $+ 8.00$ gives No. 14 Jæger at 12 inches.

There is a scar on the outer side of the left leg, $4\frac{1}{2}$ inches above external malleolus, measuring $1\frac{1}{2}$ by 2 inches. The scar on antero-external aspect of the right thigh at the level of the great trochanter measures three-fourths of an inch. Both scars are freely movable, and there is little loss of tissue.

There is no deformity of the back, and patient is able to move around quite readily.

The pulse and respiration are rapid, but it might be accounted for from the fact that applicant is just recovering from a spell of sickness.

As will be observed, about the only cause of disability of any special importance manifested at this said expert examination was impaired vision—neither the wound of the left leg, the wound of right thigh, nor the lumbago which are included among the pensioned causes of disability were found to be sources of much inconvenience to the soldier, according to the report of such examination. The said impairment of vision, however, was found to be quite well marked, the visual acuity of each eye, unaided by glasses, being but four one-hundredths, but with proper lenses the vision of each eye was brought up to twenty-seventieths.

After due consideration of the report of the said medical examination, as above set forth, the Bureau, on June 27, 1903, rejected the said claim for increase on the ground that the existing rate in the case was commensurate with the degree of disability manifested as a result of pensioned causes.

An appeal from said adverse action was taken August 10, 1903, wherein it is contended that notwithstanding the fact that, as appellant verily believes, the boards of examining surgeons and expert examining surgeons, respectively, have recommended an increase in the rate of his pension the Bureau has, without warrant, rejected his several claims for increase, and held that the conditions resulting from pensioned causes did not warrant a rate in excess of \$17 per month; also that "for over five years" appellant has "been wholly incapacitated for any manual labor," has "been disabled equal to the loss of an arm or leg," has "been confined to the house most of the time," is "crippled up, can hardly see, and is a constant great sufferer from his aforesaid disabilities."

Any contention that any action of the Bureau—in any case—that is not in conformity with the recommendations of the examining surgeons, which have been made in any particular case, is unwarranted, is, as a matter of course, wholly and utterly untenable, as such recommendations are merely advisory, and in no wise control whatever action may be taken in the premises.

The appellant's contention in this respect is, therefore, untenable. His contention that—for five years—he has been wholly incapacitated for manual labor is not sustained by the facts presented in the case, especially such facts as are related to the pensioned causes of disability. The only medical examinations held in the case since 1897—three in number, two of which were held in 1898, and the other in 1901—have been made by expert examining surgeons (oculists); but, as hereinbefore stated, the expert by whom the most recent of these said examinations was made examined the claimant for each and all causes of disability for which he was and is pensioned, and not for disease of eyes alone. And, as also before stated, this expert failed to find any very material degree of disability from any cause except from the impairment of vision described in his certificate of examination, as above quoted. And inasmuch as the said impairment of vision is shown by his findings to be due principally to optic-nerve atrophy the question naturally arises is the condition of the optic nerves (neuritis and atrophy) described by two expert examining surgeons included in the disease of eyes accepted by the Bureau as of service origin? If such conditions are not so included there is nothing in the approval spread on the brief face for "disease of eyes" to indicate that fact. It would seem, however, that inasmuch as there are so many and such a vast variety of diseases to which the visual organs and their appen-

dages are subject that a mere approval for "disease of eyes" is entirely too general a term to use in designating some lesion of these organs when a pension is allowed therefor. If the particular disease or condition, not only of the eyes but of other organs as well, accepted as having been established as of service origin were designated (in parenthesis at least) when the original approval therefor is spread on the brief face much subsequent confusion in the consideration of future claims and contentions in regard thereto might be averted. Furthermore, as a general proposition, a differential diagnosis is more easily made at an earlier than at a later consideration of the facts and conditions presented in a given case; and when the particular disease, lesion, or condition accepted as of service origin and for which a pension is granted is thus clearly defined, it becomes much less difficult to demonstrate to the claimant that any subsequent complicating condition which may arise is not part and parcel of the condition for which he is pensioned. The attention of the medical referee is especially invited to this suggestion, and the propriety of complying therewith in the future, in both original and increase claims, is submitted for his judgment, as the Department does not desire at this time to issue any special instructions upon this point.

In the case at bar the soldier is pensioned, as before stated, among other things, for "disease of eyes." He made no claim for pension on account of this said cause of disability until September 9, 1887. In his application for increase and additional pension filed on that date he said:

That while in said service (Company D, Fifteenth Indiana Infantry) he contracted disease of the eyes, from which he is unable to see in daylight or dark. That said disease was contracted on the march to Knoxville, Tenn., in fall and winter of 1863, and at same time and on same march contracted disease of spine, and that by reason of said disabilities he is unable to perform any manual labor.

The term "disease of spine" is even more general than is "disease of eyes," as a much more extensive area is involved in the former than in the latter term, and it might refer to the spinal column at one time and to the spinal cord or its meninges at another. And, like the eyes, the cord and its membranes are subject to many and various lesions, which, however, are much more obscure than are lesions of the eyes, and the character of which must be determined, in a given case, largely or principally by the history obtained and the symptoms manifested, instead of by direct inspection of the lesion itself, as can usually be done when the eyes and their appendages are involved. In this case a legal approval for "disease of back"—another indefinite term—was made under the aforesaid allegation of "disease of spine," but said disease was found upon medical examination to be lumbago, and an additional pension for "disease of back (lumbago)" was allowed December 9, 1889, the date of the medical approval spread on the

brief face, which designated the character of the "disease of back" legally approved for. By this same medical action, however, the claim on account of disease of eyes, which had also been legally approved for admission, was rejected on the ground that such alleged disease was not shown to exist in a ratable degree. But the said claim was subsequently reopened, and on February 1, 1896, the medical approval spread on the brief face allowed the following rates of additional pension: "For disease of eyes four-eighteenths (from September 9, 1887) to June 18, 1891, eight-eighteenths to September 1, 1893, and seventeen-eighteenths thereafter. Combined rates not to exceed seventeen-eighteenths."

The "combined rates" were the ten-eighteenths that had already been allowed for the other pensioned causes of disability and the seventeen-eighteenths allowed by said action for disease of eyes. The said rates were not allowed to exceed seventeen-eighteenths, or \$17 per month, because the aggregate degree of disability due to pensioned causes was not considered equivalent to the loss of a hand or foot for purposes of manual labor; and therefore the next higher rating, third grade, could not be allowed.

With the exception of the rating of four-eighteenths, which commenced from the date of filing the claim on account of disease of eyes, the rates allowed for said cause of disability commenced from the dates of medical examinations made of the pensioner's eyes, the findings at which seemed to warrant the increase in rate allowed from the respective dates thereof.

As before stated, the soldier first claimed a pension on account of disease of eyes September 9, 1887. He was first examined under this said claim November 2, 1887. In the certificate of said examination it is stated: "Eyes appear normal, except the pupils are contracted. Reads Snellen, No. XX, at 8 feet; loss of sight slight in both eyes; no disability from eyes."

The claim for disease of eyes was rejected under these findings.

The next examination was made June 18, 1890, the findings at which, in regard to the eyes, were as follows:

Eyeballs natural as to size, movements, and tension; pupils respond to light; lids show the effects of former inflammation; field of vision somewhat limited; but we are not, with the use of mydriatics and the use of the ophthalmoscope, able to find any serious defects with the refractive media of either eyeball. Claimant reads Snellen 120 at 4 feet with right eye, and No. 80 at 16 feet with left eye, and 60 at 4 feet with left eye.

The rating of eight-eighteenths was based on these findings.

An expert examination (the first held in the case) was made of the soldier's eyes September 1, 1893, the findings at which were as follows:

Lids are normal; cornea is normal in each eye; pupils contracted and do not readily respond to light and shade.

Optic-nerve atrophy; blood vessels much contracted, and disks of eyes grayish in color.

Vision: Distance, left eye=ten one-hundredths; no improvement with lenses.

Vision: Distance, right eye=six one-hundredths; no improvement with lenses.

Reading: Left eye, No. 13 Jaeger + 3.50 D.; can read No. 11.

Right eye: Can not read No. 14 Jaeger; with 4 D. can read No. 13 Jaeger.

And it was in accordance with the findings at this examination, as above set out, that the rating of seventeen-eighteenths was based.

Three subsequent expert examinations were held in the case—one in June, 1898, and made by the same surgeon who made the one referred to above, another in August, 1898, by a different examining surgeon, and the next and last in 1902, which was made by still another specialist (expert examining surgeon); but no further increase in rate was allowed from the respective dates of these said examinations.

The reports of the expert who examined the appellant September 1, 1893, and June 18, 1898, respectively, do not differ very materially as to the objective conditions manifested at said examinations, except that the report of the latter examination shows some increase in the degree of impaired vision found at the former examination. The report of the said most recent expert examination held in the premises has heretofore been quoted in full.

As will be observed, the reports of each of the experts herein quoted show that the existing impairment of vision is due to optic neuritis, with partial atrophy of both optic nerves. In the report of the expert examination of August 3, 1898, however, the examining surgeon says:

I can see no abnormal condition of the lenses; mediæ are clear. I can see the fundus of both eyes quite well with the ophthalmoscope; there is no atrophy of the papillo-macular bundle of optic nerve fibers common to retrobulbar optic neuritis of a toxic character, such as tobacco and alcohol; yet, while he (the claimant) disclaims stoutly any alcoholic toxicity, he admits an excessive use of tobacco, and thinks himself that it hurts his eyes; this would lead to a favorable prognosis in case the cause were removed, inasmuch as no positive structural change has as yet taken place in the nerve head.

Now inasmuch as the expert who examined the appellant September 1, 1893, and June 18, 1898, respectively, as well as the expert who examined him March 31, 1902, both reported that they had found optic-nerve atrophy at their said respective examinations, it seems rather strange that no such condition was observed by the expert who examined him August 3, 1898, as his examination appears to have been otherwise very thoroughly and intelligently made. As to the degree of vision manifested at this examination, the report thereof says:

He claims to see only about twenty-seventieths without glasses; with spherical + 2.50 D. he can make out some letters in twenty-fiftieths. He is presbyopic; has a pair of Sph. + 2.50 D., which he uses to write his name and to read the matter above his signature.

This report also says that the claimant made the following statement to the examining surgeon:

In December, 1863, at Charleston, Tenn., in battle, fell over a log and hurt his back. He had sore eyes after that; eyes remained weak while he was in the service; claims that his eyes still bother him; secrete and stick together sometimes, worse when he has any cold. He is an excessive user of tobacco, principally chewing.

At the examination of March 31, 1902, he told the examining surgeon that:

In 1863 he caught cold and noticed then that his eyes became weak. They have been getting worse since.

At the examination of June 18, 1898, he said:

Trouble with eyes began in 1864 on the Knoxville campaign; caught cold in a charge; eyes began to get weak. They got sore and mattered a good deal. Have been weak all the time and have been getting worse.

At the examination of September 1, 1893, he said:

Eye trouble began in 1864 at Knoxville; caught cold, eyes became very sore; was doctored in the army. Eyes are now failing very fast, and I can not see to do farming, which is my occupation. Sunlight hurts the eyes very much. Eyes get sore whenever he catches cold.

At the examination of November 2, 1887, the first examination made of his eyes, he said:

The sight is dim at night; the eyes become inflamed, and suppurate at times.

As hereinbefore stated, "no disability from disease of eyes" was found at this examination.

The records of the War Department fail to show treatment at any time for any disease or other abnormal condition of the soldier's eyes, but the former surgeon of his regiment, Dr. J. B. Adams, of Petersburg, Ind., testified in an affidavit filed April 11, 1889, that—

* * * In the month of January, 1864, while the regiment was on duty in East Tennessee, he (the soldier) contracted sore eyes as a result of cold and exposure.

He also, at the same time, suffered from some form of spinal affection, rendering him totally unable for any duty for a long time.

As will be observed, the only abnormal condition of the soldier's eyes while in the service referred to by this affiant was "sore eyes, as a result of cold and exposure."

The only other testimony as to origin in the service of the alleged disease of eyes is that of two comrades, one of whom says that the soldier "contracted a cold, which settled in his eyes, causing inflammation of the same;" and the other testified that "he was suffering from some affection of the back and also of the eyes" when he rejoined his regiment at Knoxville, Tenn., in January, 1864.

As hereinbefore shown, the surgeon of the regiment was in error when he testified that the soldier "was also suffering from some form of spinal affection," as the only "affection" in that region proved to be nothing more than lumbago, for which he is now pensioned.

As to continuance since discharge of the alleged disease of eyes

Dr. William M. Orth, now deceased, formerly of Lafayette, Ind., testified in an affidavit filed April 11, 1889, that he had been the family physician of the soldier since 1868; that during said time he had treated him for disease of eyes and injury to spine; that "the disease of eyes was the result of granulations that prevailed to such an extent during the war."

Some additional testimony—all of which, however, was lay evidence—was adduced upon special examination as to the condition of the soldier's eyes from the date of his discharge, in 1864 to 1868, when he went under the care and treatment of Doctor Orth, as testified to by the latter. The evidence so adduced was to the effect that when the soldier returned home from the service and for several years thereafter his eyes were "red, inflamed and watery," and that "he wore goggles."

Although the principal question at issue in this case at this time is the appellant's alleged title to an increase in rate for the causes of disability for which he is pensioned, the history in the case, especially in so far as the condition of his eyes is concerned, has been thus fully set out because, as will be seen, the evidence both as to the origin and continuance of the disease of eyes originally alleged by the soldier all relates to some inflammatory condition of the more superficial structures of said organs, whereas the only condition referable to such organs that is shown to constitute any material degree of disability is the impairment of vision manifested upon medical examination, which condition, in turn, is shown to be due to partial atrophy of both optic nerves and not to the said inflammatory conditions; and, also, because the several ratings allowed on account of "disease of eyes," when the claim on account of such cause of disability was admitted, appear to have been based upon the respective degrees of impairment of vision found at the different medical examinations made of the soldier from time to time. And a still further reason for setting out the foregoing résumé of the essential features presented in the case in regard to the aforesaid disease of eyes is the fact that the optic-nerve atrophy, which is now shown to be such an important factor in the case, was first observed upon medical examination in 1893, twenty-nine years subsequent to the soldier's military service. This condition, however, had very probably existed for some little time, though not diagnosed prior to the date mentioned, probably by reason of the fact that an expert examination of the eyes had not been made prior to such date; but it is hardly possible that the said condition, which is of a progressive nature, could have existed during all the years intervening between the date of the said examination and the date of the soldier's discharge without having caused much more damage than now exists, as "the prognosis of atrophy of the optic nerve is in general unfavorable" (Fuchs). The authority cited also says that

“Cases of simple atrophy for the most part lead to complete blindness,” and that—

Inflammatory atrophy affords a better prognosis, since the amount of sight which the neuritis or retinitis has left is usually permanently preserved.

This being true the importance of differentiating between the pensioned and nonpensioned causes of disability in such cases as this, as hereinbefore indicated, becomes all the more apparent.

The causes assigned by Fuchs for “simple (primary or genuine or noninflammatory) atrophy” of the optic nerve are: Spinal affections, particularly tabes dorsalis; affections of the brain, such as disseminated sclerosis and progressive paralysis of the insane; inflammation or injury of the nerve near the periphery or by compression of tumors, and in many cases the cause remains obscure. And as to the etiology of “inflammatory atrophy” of said nerve the same authority says that it is the form which occurs as a final result of a neuritis or a retinitis (neuritic or retinitic atrophy).

The ophthalmoscopic features of simple atrophy are, says the authority cited, quite distinct from those of the inflammatory form, and it is noted that the condition of the papillæ in this case, as described in the certificate of examination dated September 1, 1893, corresponds more nearly to the condition of such structures usually found in the latter form than in the former.

This much being said, it remains for the Bureau to determine in any future claim in regard to the “disease of eyes” for which the soldier is pensioned that may be presented for its consideration whether or not all existing conditions referable to the organs of vision, as herein described, were intended to be included in the approval for said pensioned cause, as such question is not now properly before the Department for consideration upon appeal.

Relative to the adequacy of the existing rate in the case to the degree of disability manifested at the last medical examination made of the appellant, it has hereinbefore been stated that no injustice is shown to have been done by the refusal of the Bureau to increase such rate. As also before stated, the principal cause of disability found at said examination was the impairment of vision described in the certificate thereof. Although the degree of impaired visual acuity was quite considerable it was much improved by the use of suitable glasses, +7 D. for the right eye, and +6 D. for the left eye, giving twenty-seventieths, or two-sevenths, vision in each eye. This is a higher and more useful degree of vision than was shown to exist in the case of William Moore (12 P. D., 87), and also in the case of John T. Watson (*idem*, 92), in each of which there was total loss of vision in one eye and but one-tenth normal vision remaining in the other eye, yet it was decided in each and both of these cases that the third-grade rate was commensu-

rate with the degree of disability due to the amount of damage to the visual acuity of the respective appellants in such cases.

The conditions shown to exist in this case are not on a par with those which obtained in the cases cited, and the appellant is, therefore, not entitled to the rate of pension allowed therein.

In view of all the facts herein set forth, it is held that the action appealed from was not error, and the same is accordingly affirmed.

ATTORNEYSHIP—NEGLECT—PRACTICE—FORFEITURE.

WILLIAM EASTER (CLAIMANT).

WILLIAM FLETCHER & Co. (ATTORNEYS).

When an attorney is in neglect through failure to file evidence in compliance with a call of the Bureau a waiver of compliance therewith subsequently to the appearance of another attorney in the claim does not operate to relieve said attorney of the charge of neglect.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
September 28, 1903.*

William Fletcher & Co., of Washington, D. C., on August 11, 1903, entered an appeal from the action of the Bureau denying them further recognition in the claim for pension under the act of June 27, 1890, of William Easter, who served in Company E, Fiftieth United States Colored Volunteer Infantry, and in Company E, Twelfth Louisiana Infantry.

In behalf of the soldier, on September 7, 1900, the appellants filed a declaration for pension under the act of June 27, 1890, which was rejected April 1, 1901. They filed, October 31, 1901, another declaration under said act in his behalf, which contained a new power of attorney in their favor. They were called upon November 12, 1901, for medical evidence. A medical examination was ordered March 27, 1903 (held May 6, 1903), of which they were advised.

Nathan Bickford, of Washington, D. C., on February 24, 1903, filed another declaration in the claim. The claim was rejected June 24, 1903, and Mr. Bickford was so advised June 30, following; hence this appeal.

The appellants were denied further recognition upon the ground that under Rule 12 they forfeited their rights by neglecting the case for more than one year, in this that they failed for one year to comply with the call for evidence of November 12, 1901.

The appellants submit that the evidence called for was unnecessary, as more than one year had elapsed since the claimant was medically examined, and therefore the filing of medical evidence to secure another medical examination was not required under the rules of practice.

The rule governing with respect to appellants' contention is stated

in the case of Darwin C. Simpson (8 P. D., 311), and reads, syllabus, as follows:

The Bureau judges as to the sufficiency of evidence filed for establishing any fact, not the attorney. So in every instance where an attorney fails for one year to respond to a call for evidence, upon the ground that the evidence called for is unnecessary, such failure is neglect.

It appears that subsequently to the appearance of Mr. Bickford in the claim the call of November 12, 1901, for medical evidence was waived and a medical examination was ordered. The waiver did not occur until more than a year had elapsed from the date of said call, and, as noted, subsequently to the appearance of another attorney in the case. It is thought that the facts bring the question as to whether appellants profited by the waiver of said call within the rule laid down in the case of Michael Guthrie (40 F. P. L. Bk., 299), which reads, syllabus, as follows:

When an attorney is in neglect through failure to file evidence required by the rules of practice a change in the practice which dispenses with such evidence does not operate to relieve an attorney of the charge of neglect.

No reason is apparent nor is any ground suggested warranting any different practice other than as laid down in the cited case, where the facts are as in the present claim, viz, that the Bureau waives the compliance of a call for evidence at a time when the attorney of record is in neglect through his failure to comply with said call, and subsequently to the appearance of another attorney in the case.

The rules of practice regard the rights of attorneys in the prosecution of claims for pension, but neither changes in said rules nor the waiver of compliance with calls for evidence can operate to clothe an attorney with new authority to continue the prosecution of a claim in which he has become in neglect, either through failure to observe the particular rule in question or to comply with the particular call which has been waived, and by his neglect another attorney has become entitled to recognition.

When compliance with the call for evidence of November 12, 1901, was waived, appellants were in default through their failure to comply with said call, and Mr. Bickford was entitled to recognition. Accordingly the action of the Bureau is affirmed.

MARRIAGE AND DIVORCE—NEW YORK—JURISDICTION.

MARY J. MARSHALL (WIDOW).

The claimant and soldier were married by ceremony in the State of New York, June 7, 1868, and they lived together in that State as man and wife until April 8, 1886, when the soldier deserted her. He applied for and obtained a divorce from claimant on November 6, 1891, while in the State of Wisconsin, on the ground of desertion, and on August 2, 1892, he married one Lillian Gridley, the ceremony being performed in the State of Wisconsin. The claimant resided in New York at the time said divorce was granted, was not served with process, and made no appearance at the trial and authorized no defense.

Held: That the courts of New York having decided that a divorce obtained in another State against a citizen of New York, in an action where there was no personal service of process within the former State and no personal appearance in the action by the defendant, is void in the State of New York, and does not change the status of the defendant in the jurisdiction of the State of New York, this claimant is therefore held to be the legal widow of the soldier.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions
September 28, 1903.*

On October 23, 1894, Mary J. Marshall filed a claim for pension under section 3 of the act of June 27, 1890, as the widow of Edmund Marshall, who served as a private in Company B, Twentieth New York Volunteer Cavalry, which claim was rejected by your Bureau September 11, 1896, for the following stated reasons:

Approved for rejection. Claimant not the legal widow of soldier, he having been divorced from her.

An effort was subsequently made to reopen the claim with adverse results, and finally, on May 17, 1902, this appeal was filed.

The evidence shows that this claimant and the soldier were united by ceremonial marriage at Philadelphia, Jefferson County, N. Y., on June 7, 1868. They lived together as man and wife in the counties of Jefferson and St. Lawrence, N. Y., and about 1880 moved to Gloversville, N. Y., where the soldier engaged in the harness manufacturing business with Clark E. Dodge, under the firm name of Marshall & Dodge.

It appears that on April 7, 1886, the soldier sent a letter to the claimant's sister, Mrs. Emma Cheney, who resided at Auburn, N. Y., in which he stated that he was anxious to put up a job on his wife in order to get her to visit Auburn for a week, so that he could purchase a new carpet and parlor suit, have the furniture all in place, and thereby give her a surprise on her return home. In order to get Mrs. Marshall to Auburn he asked Mrs. Cheney to send him a telegram in the following words: "Emma is very sick. If you want to see her alive come immediately. H. N. Cheney."

The telegram was sent and reached the claimant the day following, and at 2 o'clock the same afternoon she left Gloversville for Auburn, the soldier accompanying her to the Gloversville station.

It clearly appears from the evidence that the soldier had prepared a surprise for the claimant, but not on the lines indicated in his letter to her sister. Immediately after the claimant left Gloversville the soldier went to his home and packed up his personal effects, and that evening left Gloversville in company with a woman known as Annie Frank or Tillie Gray, and better known in social circles of Gloversville as the "Glove maker." The claimant never saw the soldier after their parting at the Gloversville station on the afternoon of April 8, 1886.

The claimant returned to Gloversville and continued to reside there for several months, and then went to Auburn, N. Y., where she resided until December, 1892, when she went to Kankakee, Ill., where she remained a few years and then returned to New York, and now resides with her father at Black River, N. Y.

There is some evidence to show that the soldier went to California with his mistress, and that at a later period he was in Newark, N. J. It is positively shown that in 1891 he was a resident of Milwaukee, Wis., and on August 18, 1891, he filed a complaint in the circuit court of Milwaukee County, Wis., in an action for divorce with this claimant in the rôle of defendant. He alleged in said complaint that he was married to the claimant on June 8, 1868; that about April, 1886, the defendant wilfully deserted him, and that for five years preceding the defendant without cause or provocation had been guilty of wilful desertion. He further alleged that her last known place of residence was Chicago, Ill. Service of the summons and complaint in the divorce action was obtained by publication, and finally on November 6, 1891, at a general term of the circuit court for Milwaukee County, Hon. D. H. Johnson judge presiding, a judgment of divorce was granted the soldier.

It appears from the evidence taken on the trial of said divorce proceeding that there was no appearance on the part of the defendant. The soldier and his sister, Mrs. H. E. Shoots, of Milwaukee, Wis., both testified that the claimant deserted the soldier in April, 1886, when they resided in Gloversville, N. Y., and that her last known place of residence was in Chicago, Ill.

The facts as disclosed from the evidence in the claim in contention show that Mrs. Shoots resided in Gloversville, N. Y., in 1886, and well knew the circumstances connected with the elopement of the soldier and Annie Frank, as other witnesses testify that the scandal connected with the affair was fully exploited in the papers of Gloversville at the time of the occurrence. It also clearly appears from the evidence in this case that both the soldier and Mrs. Shoots were aware that the claimant resided in Auburn, N. Y., at the time the application for divorce was made, and it does not appear that the claimant ever resided in Chicago, Ill.

It appears from record evidence on file herein that on August 2, 1892, the soldier was united in marriage to one Lillian R. Gridley. A year or so after his second marriage he was admitted to the Soldiers' Home in Milwaukee and died in said institution on September 19, 1894.

The evidence clearly shows that the claimant and the soldier were united by ceremonial marriage under the laws of the State of New York in 1868 and that they lived and cohabited together as man and wife until 1886, when he deserted her. The evidence tends to show that the claimant made diligent efforts to ascertain the whereabouts of

her husband, and in December, 1892, she went to the State of Illinois, and at the time the soldier died she was supporting herself by conducting a boarding house in Kankakee, Ill.

The act of Congress approved August 7, 1882, provides that in pension cases marriages shall be proven to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued.

The claimant was born in the State of New York, was legally married to the soldier in said State and was a resident therein at the time the soldier was granted a decree of divorce by the Wisconsin court and at the time of the soldier's marriage to Lillian Gridley. She is now, and in fact always has been, a resident of New York, with the exception of a few years spent in the State of Illinois. The laws of New York must, therefore, obtain in this case.

While there is no statute in New York State which declares that a divorce granted in another State under certain circumstances shall be void within that State, there can be no doubt that under the law of New York, as interpreted by its courts, a divorce obtained in another State against a citizen of New York in an action where there was no personal service and no personal appearance on the part of the defendant, is void in the State of New York.

In the case of *Davis v. Davis* (2 Del., N. Y., 549) the court held:

A decree of divorce in another State, proceeding on a constructive service of process by publication, though valid by the law of the forum, is, by the law of New York, a nullity as to a defendant spouse resident in New York.

In the case of the People of the State of New York *v. Frank M. Baker* (76 N. Y., 78) the court held:

A State may adjudge the status of its own citizens toward nonresidents and may authorize to that end such judicial proceedings as it sees fit; but the judgment can have no effect within the bounds of another State so as to fix upon a citizen of the latter a status, against his will and without his consent, which is in hostility with the laws of the sovereignty of his allegiance. A court of another State can not adjudge the dissolution of the marital relations of a citizen of this State, domiciled and actually residing here during the pendency of the judicial proceedings in such State, without a voluntary appearance on his part therein, and with no actual notice to him thereof; and this although the marriage was solemnized in another State.

In the matter of *Strong* (86 Hun., N. Y., 390) the court held:

A divorce obtained in another State against a citizen of New York in an action where there was no personal service of process within the former State and no personal appearance in the action by the defendant, is void in the State of New York, and does not change the status of the defendant in the jurisdiction of the State of New York.

In the case under consideration the evidence clearly tends to show that the testimony produced by the soldier and on which his decree of divorce was granted by a Wisconsin court was not in accord with the facts and was fraudulent, and there can be no doubt that under the law

of New York the claimant is there held to be the legal widow of the soldier.

The action of your Bureau in rejecting this claim on the grounds stated is reversed.

DIVISION OF PENSION—MARRIAGE—MORAL CHARACTER.

POST *v.* POST.

The mere fact that claimant married a second husband under the belief that her first husband was dead, does not justify the rejection of her claim for one-half her first husband's pension upon the ground that she was not a woman of good moral character, even though her belief was not well founded.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, September 28, 1903.

Sarah Post appealed June 27, 1903, from the Bureau action of April 24, 1903, rejecting her claim filed December 4, 1902, for one-half the pension of her husband, Franklin M. Post, a pensioner under certificate No. 65886, wherein the Department held that—

Claimant can not be considered a woman of good moral character within the meaning of the act of March 3, 1899, she having married and cohabited with one William H. Ellsworth for twenty years subsequent to soldier's alleged desertion, in the absence of "due diligence" to ascertain whether or not soldier was alive.

Claimant contends, in her said appeal, as follows:

First. There is no evidence in the case to show that any acts on any (my) part were of any immoral character. On the contrary, the evidence shows that I have always, and at all times, carried myself as a respectable Christian woman, with not a spot upon my character.

Second. That the action of the Bureau of Pensions in stamping me as a woman of immoral character because I married after desertion of my husband, Post, and lived with my second husband for twenty years, is wholly without foundation, and against the facts in the case, as will appear in the following:

In March, 1874, Post lost his business in Brooklyn, N. Y., through fast living, spending his money on fast women, and after that he sent me to Georgia, Vt., to his relatives, with my three children, Minnie, Charles, and Harry. In a week or two my husband, Post, came to Georgia, Vt., to where I was stopping with his relatives, and he remained there until April 22, 1874, when he said he was going to Detroit, Mich., to sell millinery goods. After he went to Detroit, Mich., I remained at Georgia, Vt., and we corresponded. He remained in Detroit, Mich., until September, 1874, and then he said he was going to Windsor, Canada, and further to Texas, on a ranch. He wrote to me to go to Brooklyn to try and collect some bills for him, which I did, and he said he may never come back; that was the last time I ever heard from him.

After my husband last wrote to me, on September, 1874, I wrote to the postmaster at Windsor, Canada, as to his whereabouts, and he replied that he did not know anything about him. I also made inquiries from his mother, Diana Post, and his sister, Mrs. Stephen Conger, as to his whereabouts, and they informed me that they knew nothing about him. I made further inquiries from other sources.

I finally went to Mayor Schroeder, of Brooklyn, N. Y., in company with Mrs. Bayles, to find out if the city could not try and help me locate Post, but he said he could not help me.

Before I married Mr. Ellsworth, he got advice from a lawyer in Brooklyn, N. Y., whether he could marry me and was informed that he could marry me in view of the fact that my husband, Post, had deserted me and that he had absented himself so long he was presumed to be dead.

Had I not been perfectly satisfied that I had a right to marry I would not have entered into a marriage contract. My married life with Franklin M. Post was without spot or blemish, and I was a dutiful wife to Mr. Ellsworth. I can submit all the witnesses necessary in this matter to show that I have always been a woman of good moral character; that I entered into the marriage contract with Ellsworth in good faith, having made inquiries from different sources as to the whereabouts of Post without avail.

All of which was respectfully submitted with the hope that my claim may be favorably passed upon and thereby destroy the stigma against my good character.

A copy of this appeal was duly served upon the pensioner, but he has failed to file any brief or answer in response thereto.

Prior to the adjudication of this claim the question of the legality of claimant's second marriage was submitted to the chief of the Law Division, who, on April 17, 1903, rendered the following opinion:

The undisputed facts disclosed by the evidence in this case show that this claimant was married to the soldier, Franklin M. Post, at Brooklyn, N. Y., February 23, 1865, in accordance with legal forms and that they lived together as husband and wife from the date of said ceremony, three children having been the issue of their union up to his desertion in 1874, which said desertion has continued to the present time. The claimant, it appears, heard from the soldier after his desertion in January, 1876, and she subsequently, on December 31, 1880, entered into a second marriage in Brooklyn, N. Y., with one William H. Ellsworth, formerly a member of Company F, Seventh Indiana Cavalry, with whom she continued to live until his death on March 31, 1900. A claim filed by her on May 11, 1900, under the act of June 27, 1890, was rejected after special examination in May, 1902, upon the ground that she was not the legal widow of the soldier, Ellsworth, for at that time she had a husband living from whom she had not been divorced. The claimant, after rejection of her claim as widow of Ellsworth, on December 11, 1902, filed a claim for one-half the pension of the soldier, Franklin M. Post, which is now pending adjudication.

I have carefully considered all the evidence submitted in this case, under the decision of the Department in the case of Mary N. Lester (12 P. D., 340), and as it appears to be well established that this claimant did not remarry Ellsworth in the belief that her first husband was dead or that she exercised due diligence in ascertaining his whereabouts, I am of the opinion that she clearly has status to recognition as the lawful wife of the soldier, Franklin M. Post, and it is so held.

The foregoing statement of facts is accepted by the Department as correct for the purposes of this decision, except so far as it relates to claimant's belief as to her first husband's death at the date of her marriage to her second husband. Her belief may not have been well founded or legally justified, and good judgment might have suggested that she should have made further investigation before acting upon the belief that her first husband was dead, yet it is more consistent with the evidence and the presumption of innocence to believe that

claimant was honest and sincere in her belief that she was legally competent to enter into a valid marriage with her second husband, under the law of the State of New York, which provides that—

If any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority. (Sec. 6, ch. 8, art. 1, p. 2332, Rev. Stat., New York.)

The New York courts have repeatedly, and it is believed consistently, held that marriages such as are provided for in said section 6, are avoidable merely, and not void, where it is shown that the absent party is still alive, and that such marriages are valid until declared void on a proper application to a court of competent jurisdiction during the lifetime of the parties thereto; that unless so nullified within the lifetime of the parties to such marriage it is as legal in its origin and continuance as any other marriage. *Cropsey v. McKinney* (30 Barb., 47-55); *Jones v. Zoller* (29 Hun., 551); *White v. Lowe* (1 Redf., 376); *Gall v. Gall* (114 N. Y., 109); *Griffin v. Banks* (24 How., 215); *Valleau v. Valleau* (6 Paige, 207); *Brower v. Brower* (1 Abb., Ct. App., 214); *Taylor v. Taylor* (25 N. Y., Misc., 566); *Miller v. Dodge* (28 N. Y., Misc., 238). See also departmental decisions in the case of *Amy Collins* (12 P. D., 292); *Ann Green* (12 P. D., 306), cited and followed in the cases of *Peggy Thomas* (13 P. D., 98-103), and *Strunk v. Strunk* (14 P. D., 17).

The claim under consideration was specially examined and the most critical investigation failed to procure any testimony adverse to claimant's character, except the unsupported deposition of her first husband, the pensioner. Reputable witnesses, who had known her practically from childhood and continuously since her first marriage, testified to her good moral character and reputation.

The special examiner reported March 17, 1902, that—

From what I can learn, the claimant bears a good reputation. She is as deaf as a post and nearly blind. She has been under the impression that Post was dead to her in the eye of the law of the State of New York, and consequently she had a perfect right to remarry to Ellsworth. About one and one-half years after Post deserted her she located him and wrote to him, and he replied to the letter. The letter was of such a vulgar character, the contents being of such a nature that it was not fit to be read, so I did not take it and make it a part of this report, as I was satisfied it would be of no service to us.

The only act or conduct reflecting upon her character was her marriage to her second husband, Ellsworth, in Brooklyn, N. Y., March 31, 1880, and with whom she lived and cohabited in marital relation to the date of his death, December 31, 1900, bearing him three children.

While she has failed to prove that her said second marriage was such as is designated in the New York statute (*supra*), by reason of

testimony voluntarily furnished by her, i. e., the letter from her husband, the pensioner, in January, 1876, yet it does not follow that because her marriage with Ellsworth was void she is, therefore, not a woman of good moral character.

It is to be borne in mind that a guilty or immoral intent, is not, in the absence of a statute, an essential element necessary to be alleged or proved in order to convict the party of the crime of adultery or adulterous cohabitation. It is the living together and not the knowledge or intent that constitutes the offense. As held in the case of *Fox v. State* (3 Tex., 329):

The criminal offense of adultery is not excused by the absence of guilty intent unless a guilty knowledge is a part of the statutory definition.

So, in the case of *Commonwealth v. Elwell* (2 Met., 190), the court held that the offense of adultery was committed though defendant was ignorant that the woman was married. See also *White v. White* (105 Mass., 327).

While ignorance of the law is no excuse, yet the fact that by reason of ignorance, mistake of fact, or want of due diligence the party violates the law does not destroy the good moral character of the party unless the offense is so inconsistent with good morals as to overcome the legal presumption in favor of good character. Here claimant's conduct is entirely consistent with good moral character and innocence. Her husband deserted her in 1874, having left her and their three children without legal justification and in violation of his marriage contract. The evidence shows that he left claimant and Brooklyn, N. Y., where he resided, with a woman of ill repute in 1874, and that after repeated efforts on the part of claimant to ascertain his whereabouts, she received a letter from him January, 1876, too vulgar to be admitted on file in evidence; that she received no further communication from him or of him thereafter; that four years and eleven months after receiving said letter, and her last information from him, believing him dead and that she was legally competent to contract a second marriage, she was married to Ellsworth, as aforesaid; that previous to the time pensioner deserted claimant, in 1874, he had been living a life of dissipation and immorality, and that her belief in his death was based upon his dissipated habits and continued absence and silence. She is shown to have been a dutiful wife, the mother of six children, three by pensioner, and that her life has been blameless but for her said second marriage. Her relations with Ellsworth were dissolved by his death in 1900, since which time the evidence shows that she has lived a moral life and that she commands the respect of her children and neighbors. Her claim was not filed until December 4, 1902, at which time, and since, she has shown by affirmative, satisfactory evidence that she is such a person as is designated in the first proviso of the act of March 3, 1899.

The pensioner is the party at fault. He is the willful deserter. But for his desertion claimant's subsequent marriage could not have occurred.

He testified before the special examiner, May 15, 1902, that he left his wife, Sarah Post, in March, 1874, because they had a continual quarrel; that he was young at the time, and may have made some mistakes; that after he left he did not correspond "with any of his folks until 1885, or along that time;" that he was never divorced from his said wife, and had never remarried, but had a housekeeper; and did write to his daughter that he had been married.

Pensioner's parents resided at Georgia, Vt., and he contended before the Bureau that his wife could have learned of his whereabouts by inquiring of them. There is no proof, however, that his parents had any knowledge of his whereabouts, and he admits that after leaving home in 1874 he did not write to "his folks till about 1885," which was about five years after claimant had remarried. If his testimony is true in this regard it would indicate that his parents and relatives had no more knowledge of his whereabouts than his wife or children, and that she could have obtained no information on that subject from them.

Pensioner gives his occupation as that of a miner, and his post-office address as Buckeye, Shasta County, Cal. Since leaving claimant he appears to have resided in the Territory and State of Washington, and the State of California.

The children of claimant and pensioner testify that when they learned that their father was alive, by correspondence with him, it was after their mother's second marriage, and that they kept the knowledge from her in order that she might not worry over the matter.

So, also, if pensioner's testimony is true, it would follow that he did not write the letter to his wife which she claims to have received from him in 1876.

If claimant is not the legal widow of Ellsworth then she is the lawful wife of pensioner.

She has proved his desertion for over six months prior to December 4, 1902, the date on which she filed her application, and has proved that she is a woman of good moral character, and has been at and subsequent to the filing of her said application, and that she is in necessitous circumstances. These facts bring her clearly within the provision of the act of March 3, 1899, wherein it is provided that—

In case a resident pensioner of the United States shall for a period of over six months desert his lawful wife, she being a woman of good moral character, and in necessitous circumstances, * * * the Commissioner of Pensions is hereby directed, upon being satisfied by competent evidence of such desertion, to cause one-half the pension due or to become due said pensioner during the continuance of such desertion to be paid to the wife.

The question raised by this appeal is whether claimant is shown to be a woman of good moral character, and the Department is of the opinion that this question must be answered in the affirmative.

The mere fact that claimant married her second husband under the belief that her first husband was dead, or that she was legally competent to contract a second marriage, does not justify the rejection of her claim for one-half her first husband's pension on the ground that she was not a woman of good moral character, even though her belief was not well founded and she was mistaken as to her legal right to remarry.

The action appealed from is accordingly reversed.

DISABILITY—PERMANENT AND SPECIFIC—RATING.

WILLIAM H. WORMSTEAD.

The evidence shows that the claimant was totally and permanently disabled in his left hand by a gunshot wound at the date of his medical examination, August 14, 1865, and continuously since, and he is entitled to the specific ratings provided by law.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, September 30, 1903.

William H. Wormstead, formerly a private in Company C, Thirty-second Massachusetts Volunteer Infantry, was a pensioner under the general law at the rate of \$8 per month from May 18, 1865, for gunshot wound of the left hand, which was increased to \$14 from October 11, 1873, and to \$16 from May 9, 1880; to \$17 from November 28, 1888, and to \$24 per month from December 4, 1889, for the same disability.

On November 19, 1897, the claimant filed his application for an increase and rerating of his pension, alleging that the gunshot wound in his left hand had practically destroyed its usefulness, which he believed entitled him to a rate of \$30 per month, and that the rate of pension originally allowed him was too low and not commensurate with the extent of his disability.

This application was rejected April 21, 1899, on the ground that a rerating was not warranted from a medical standpoint.

From this action the claimant, through his attorneys, appealed May 4, 1899.

Upon the appeal the claimant's application for an increase, filed May 11, 1889, was reviewed by the Department, when the action of the Bureau was reversed by departmental decision under date of July 31, 1901, and a rate of \$24 per month was allowed the claimant to date from his medical examination of December 4, 1889. The Department holding that inasmuch as it had been demonstrated that the hand in question was of no practical benefit, save that of a paper weight, the claimant was entitled to the rating provided by law for a disability equivalent to that of the loss of a hand.

On November 25, 1901, the claimant filed his application for an increase and rerating of his pension, alleging that he believed himself entitled to \$18 per month from June 4, 1872, \$24 per month from March 3, 1883, and \$30 per month from the date of the passage of the act of August 4, 1886, providing for the total disability of one hand.

This application was rejected February 20, 1902, on the ground that the rates allowed were fully commensurate with the degree of his disability from the causes for which he was pensioned—gunshot wound of the left hand—as shown by the certificates of medical examinations and other evidence on file at the dates of adjudication.

From this action the claimant, through his attorneys, appealed March 26, 1902, contending that he did not have any more use of his hand in June, 1885, than on December 4, 1889, when he was allowed a rating of \$24 per month for the same, and that he was entitled to \$30 per month from the passage of the act of August 4, 1886, as alleged.

Upon a consideration of this appeal the Department held, by its decision under date of July 31, 1903, that nothing was presented in the present appeal that was not presented in the former and considered by the Department when the former decision was rendered; that the contentions the claimant then made were before the Department when it held that title to third-grade pension was not shown until December 4, 1889, and that a higher rate had not been warranted since the date of that certificate of examination, and the action of the Bureau was thereupon affirmed.

On September 12, 1903, the claimant, through his attorneys, filed a motion for a reconsideration. The case is therefore before the Department for a reconsideration.

The claimant is doubtless correct, as a matter of fact, in his contention that there was no more power in his left hand for the purposes of manual labor in June, 1885, than there was on December 4, 1889, from which latter date he was allowed \$24 per month. The wound to the hand was one that was not progressive in its nature. It was evidently just as disabling from the time of its incurrence and the removal of the middle fingers and the healing as at any time thereafter. This thought is borne out by the surgeon's certificate of disability upon which he was discharged, dated January 18, 1865, solely on account of the wound in question, in which it is stated that he was found to be incapable of performing the duties of a soldier because of the total loss of the use of his left hand, the result of a gunshot wound; also, by his first medical examination, made August 14, 1865, in which appears the following:

Totally disabled. Ball passed through left hand from palm to back, between metacarpal bones of middle and ring fingers near their anterior extremity. Both these bones shattered or splintered; gangrene occurred in July, a large portion sloughing. In October, ring and middle fingers removed; also portions of metacarpal bones.

Now index and little fingers are atrophied and stiff, especially the index. No power to grasp; can scarcely bring thumb and finger together. Thumb normal; palm of hand sensitive in vicinity of wound; should think he might have some use of the member by and by.

Again, on August 16, 1866, under an application for an increase, the following was reported:

Ring and middle fingers, with portion of three metacarpal bones, removed. Hand and remaining fingers exceedingly atrophied, unable to close finger on palm; can just bring thumb and index finger together. Palm of hand morbidly sensitive near wound. Attempt to clasp object nearly futile. If persisted in, hand swells and becomes lame and painful. Can see no prospect of any important improvement. Should consider the disability equivalent to loss of hand.

The act of March 3, 1883, provides that where the claimant has lost one hand or one foot, or been totally or permanently disabled in the same, he shall receive a pension of \$24 per month. The Department very properly held in this case, July 31, 1901, from the medical certificates of December 4 and March 8, 1899, that "the hand in question was of no practical benefit to the claimant save that of a paper weight, and in its present condition and shape was of no adornment to the person, and that it could not be discovered that it was of any use whatever for the purposes of manual labor; that a proper arrangement of a fork or spoon might be attached to the thumb, and such might be true of a number of small articles with which claimant might aid himself in a very limited way; but if the same care were bestowed upon the stump of the wrist, were the entire hand amputated, the same ends might be accomplished. The advantages now possessed by the claimant over those which would be present if his hand were amputated, from a standpoint of value for labor, or of practical use, are so slight and trifling as to be hardly worth mentioning."

The Department having held in effect, and it is believed correctly so, that the claimant was totally and permanently disabled in his left hand, he would therefore be entitled to the specific ratings provided by law and a rating in compliance therewith, because it is very reasonable to presume from the nature of the wound and the condition of the claimant's hand that the same disability has continued to exist since his discharge to the present time. Probably no change has taken place. The hand has certainly not grown more feeble and disabling. It would naturally, if it were possible, adapt itself to circumstances, and by constant use become somewhat useful; but the condition and shape it is in is such that it could not possibly become of any practical use whatever for manual labor or otherwise, except, perhaps, as is stated in the medical certificate of July 20, 1898, only as a paper weight, and it is stated in the medical certificate of December 4, 1889, that the two remaining fingers could not be flexed upon the hand more than one-fourth from a straight line. The left carpus was enlarged but not ankylosed, which was equal to the loss of all the fingers and palm.

The anchylosed fingers were of little use, if not in the way. In the certificate of March 8, 1899, it is stated that the central part of the palm of the hand had been removed, leaving a part on each side, so that it did not appear like a palm and could not be used to hold anything.

While the medical reports made prior to the one under date of December 4, 1889, do not go into details and are not so expressive as said report, they practically describe the same disability, except, perhaps, the one bearing date of August 12, 1885, which is as follows:

Gunshot wound of left hand: The second and third fingers are absent. Some impairment of motion of the index and fourth fingers. The thumb is thoroughly useful. The hand is not totally disabled, hence the disability is not equal to the loss of a hand.

The thumb may not be impaired, but it certainly can not be of any use when the two remaining fingers are in such a condition that it has nothing to be useful with. This report suggests the thought that the examining board was desirous of making short work of the case and getting rid of it as soon as possible.

As the claimant's left hand is totally and permanently disabled by the gunshot wound, this is not a claim for some other physical disability which would be equivalent to the loss of a hand or foot, but is for a total disability of the hand, and therefore comes within the act of August 4, 1886, wherein it is provided that when the claimant shall have lost one hand or one foot, or been totally disabled in the same, he shall receive a pension of \$30 per month. It will be noticed that the same provision is made in the act of June 4, 1872, when a rating of \$18 per month was provided, and also the act of March 3, 1883. The same language is used in both these acts as in the act of August 4, 1886, except the words "or permanently" are added, and in these acts a further provision is made where the claimant is otherwise disabled; that is, disabled by some other disability than the loss of one hand or one foot, so as to render him incapacitated for the performance of manual labor to such a degree that such disability would be equivalent to the loss of a hand or foot. It will be observed that there are four separate and distinct disabilities enumerated for which a claimant may be pensioned under the provisions of these two acts, viz, for the loss of a hand, for the loss of a foot, for the total or permanent disability of either a hand or foot, and for any other disability that would incapacitate him for the performance of manual labor to such an extent as to be equivalent to the loss of a hand or foot.

This is a claim for the total or the permanent disability of the hand, and not for some other disability that would be considered equivalent to the loss of a hand or foot. In other words, it is not a claim for an equivalent disability—a disability that is equivalent to any other pre-

scribed disability—but a disability per se, the total or permanent disability of the left hand, which is clearly and distinctly provided for in all three of the acts cited herein.

The Department was in error in its decision in this case of July 31, 1901, in treating the disability in question as being within the provision of the law granting pension for a disability which would be equivalent to the loss of a hand or foot.

It is presumed not to be out of place to mention here that the act of March 2, 1903, also provides that all persons on the pension roll who, while in the military or naval service of the United States and in line of duty, shall have lost one hand or one foot or been totally disabled in the same, shall receive a pension of \$40 per month. This claimant being totally disabled in his left hand would come within the provisions of that act.

The Department must conclude that the claimant is entitled to the specific rating provided by law for the total disability of one hand from the date of his discharge from the service.

The action of the Bureau in rejecting the claimant's application for an increase and rerating is therefore hereby reversed, and the papers in the case are herewith returned for further adjudication in accordance with this decision.

ATTORNEYSHIP—SUBSTITUTION—POWER OF ATTORNEY.

MINORS OF JAMES T. KYLE (CLAIMANTS).

W. W. DUDLEY & Co. (ATTORNEYS).

For the purpose of transferring the attorneyship in a claim for pension by one attorney or agent to another, it is not necessary that an attorney be clothed with power of substitution by the claimant. (Overruling *Esther Geddings*, 36 F. P. L.; Bk., 374.)

Assistant Secretary M. W. Miller to the Commissioner of Pensions, September 30, 1903.

W. W. Dudley & Co., of Washington, D. C., on July 29, 1903, entered an appeal from the action of the Bureau denying them a fee on the issue of January 3, 1898, in the claim for pension under the act of June 27, 1890, of Alice J. and George Kyle, as minor children of James T. Kyle, deceased, who served in Company E, Twenty-sixth Missouri Volunteer Infantry.

In behalf of Alice J. and George Kyle, as minor children of James T. Kyle, deceased, Jere Johnson, of Washington, D. C., on September 2, 1891, filed a declaration for pension under the act of June 27, 1890. Said attorney made a general transfer of his pension business to these appellants, the evidence of which was filed August 18, 1896, in the

Bureau, and they filed, November 18, 1896, the written consent of the claimant to the transfer of the attorneyship in this case by Mr. Johnson to them. They filed March 20, 1897, evidence in response to the Bureau's call therefor of February 15, 1897. Certificate issued January 3, 1898, to allow pension in the claim from September 2, 1891, date of filing declaration. On said issue a fee of \$10 was certified to Messrs. W. W. Dudley & Co. They have been required to refund said fee by the Bureau, hence this appeal.

The declaration filed by Mr. Johnson, contained a power of attorney in his favor. There is no other evidence on file of his authority to prosecute the claim. A fee is denied the appellants upon the ground that they were never properly authorized to appear in the claim, that they did not obtain a power of attorney to prosecute the case direct from the claimant and that Mr. Johnson was without authority to substitute them as attorneys in the claim in his stead.

Rule 1 of the Rules of Practice before the Commissioner of Pensions provides that—

A person appearing of record in this Office as having complied with the requirements of the regulations prescribed by the Secretary of the Interior for the recognition of attorneys or agents for claimants before the Department of the Interior will be held authorized to prosecute any claim on filing a power of attorney from the claimant.

Such power of attorney must be signed by the claimant in the presence of two witnesses and his execution thereof acknowledged before an officer duly authorized to administer oaths for general purposes. (See Rule 4.)

Concerning the assignment of attorneyship or agency by one attorney or agent to another the provisions made by rules of practice before the Commissioner of Pensions are that the attorney or agent at the time of such assignment shall be in good standing as a practitioner before the Bureau of Pensions, and the assignee shall file the written consent of the applicant in each respective claim to the assignment of the attorneyship therein. (See Rules Nos. 2 and 3.)

The method of the execution of the transfers of attorneyships in claims for pension by attorneys is further regulated by the Bureau where the instruments of transfers are filed; the regulations are set forth in a circular based on the above-cited rules of practice.

The law (section 5 of the act of July 4, 1884) among other things provides that—

The Secretary of the Interior may prescribe rules and regulations governing the recognition of agents and attorneys or other persons representing claimants before the Department.

There are many ways by which a person can authorize an attorney to prosecute proceedings in his behalf. The contract can be shown by power of attorney, by letter, by admission, and by cooperation.

It may be either expressed or implied, and serves equally well by whatsoever method an attorneyship is established in courts of justice. In claims for pension, however, it is deemed expedient that the authority of an attorney to prosecute a case should appear by a power of attorney. The regulations pertaining to contracts of attorneyship thus entered into governing in the practice as set forth in the rules are as herein stated, and nothing is found in any statute relative to the subject other than is contained in section 5 of the act of July 4, 1884.

An agency or attorneyship created by an instrument known as a power of attorney, such as is required in pension claims, differs in no essential particular from other agencies or attorneyships created by other methods. The power is limited to and designed for a purpose, and the principles of law applicable to agencies are applicable to agencies and attorneyships created by powers of attorney. For instance, relative to assignments or transfers of most agencies, however created, the law is that an assignment is usually subject to the approval of the principal, and when a transfer of attorneyship or agency is made by one attorney to another it is not necessary that the agent or attorney making the transfer be clothed with express power in his contract with his principal to transfer or assign an agency. Without the consent of the principal the transfer would have no binding effect upon him. But he can approve of the transaction, and it thus becomes binding in law. The exception is that when permissible by law the agent or attorney is clothed with full power by the principal to substitute another in his place and stead to do the acts he is to do by the terms of the agency. In such a case it is manifest that the consent of the principal is not necessary to a transfer of the agency. In agencies or attorneyships for the further prosecution of a claim for pension a transfer or assignment thereof without the written consent of the claimant is not recognized by the Bureau, even though the attorney is clothed by the terms of his contract with the claimant to substitute another attorney in his place and stead. The query is, then, what purpose can it serve for a claimant to give an attorney permission to assign an attorneyship by the terms of his contract with an attorney looking to the prosecution of a claim for pension when by the rules of practice the exercise of this power is of no effect whatever, conveys no right, and confers no benefit upon an assignee? It is clear that a power of substitution under the rules of practice confers no right upon an attorney in the first instance. He can as well assign the claim without such power as he can with it. A view seems to have been taken that the assignment by an attorney of his rights in a claim for pension carried with it something independent of what he could grant by the exercise of a power of substitution. What is this supposed something is hard to determine. The attorney by assigning

the attorneyship, though he has no power of substitution, assigns all his rights in a claim, including his right to recognition by the Bureau, with the effect that an assignment by him would have if he were clothed with full power to substitute another in his place to continue the prosecution of the claim.

Ruling No. 54 of the Commissioner of Pensions (Digest of 1885, p. 47), dated January 29, 1872, reads:

The original attorney having power of substitution may transfer his authority to act in lieu or in behalf of a claimant to a second party, but can not give to said second party power of substitution of or transfer to a third party unless the power of attorney given by the principal to him, the first attorney, provides therefor in express terms.

In the case of Henrietta J. McNealy, certificate No. 458601, decided February 6, 1893 (14 Fee P. L. Bk., p. 62), the facts were that the claimant gave a power of attorney with full power of substitution to Gilbert Moyers, who assigned the claim to George D. Mitchell, and he in turn to B. M. Potter, who filed evidence July 9, 1891, forwarded to him by the claimant. She subsequently, April 22, 1892, gave Jewell and Nicholson a power of attorney, who entered an appeal from the action of the Bureau denying them recognition. The Department held that Mr. Potter was without authority to prosecute the claim, as his transferer, Mr. Mitchell, had no power conferred upon him to substitute Mr. Potter as the attorney in the claim in his place and stead.

The decisions of the Department upon the question have been in accord with the cited decision with the single exception in the case of Esther Geddings as widow of John F. Dimmick, certificate No. 479504, dated October 18, 1900. (36 F. P. L. Bk., 374.) In that case the attorneyship was transferred to the appellant, W. W. Dudley, by Charles H. McCarty, to whom the attorneyship was transferred by the original attorney, S. L. Rowan, who was clothed with authority by the claimant to substitute another in his place and stead to prosecute the claim. This power he exercised in favor of Mr. McCarty, but the latter was never given any power of substitution in express terms, nor did the appellant file the written consent of the claimant to the transfer of the attorneyship to him by Mr. McCarty. An order was issued July 5, 1888, by the Commissioner of Pensions to the effect that the appellant should be recognized in all claims assigned to him by Mr. McCarty in which the latter at the time of the assignment was entitled to recognition. The claimant cooperated for eleven years with Mr. Dudley in the prosecution of the claim. It was held that (p. 376) "under the conditions arising in this particular case and in view of the fact that the appellant (Mr. Dudley) was warranted in relying upon the action of the Commissioner of Pensions in approving his title to recognition upon his appearance in the claim, 'that he was entitled to a fee upon the allowance of the case.'"

As before stated herein, the regulations issued by the Secretary relative to the transfer of attorneyships in a claim for pension require the written consent of the claimant to be filed in order to complete the transfer. Nothing is contained in the regulations that require an attorney to be clothed with specific express power to substitute another attorney in his place and stead, if he wishes so to do. Such regulation would be nothing more than a requirement that an attorney obtain a consent from the claimant to transfer the claim prior to the attorney making such transfer, and would be a useless requirement in view of the fact that the rules specify that the written consent of the claimant shall be obtained after the attorney has executed an assignment of the attorneyship, and in effect providing for the filing of such written consent whether or not the claimant has already given his consent by clothing his attorney with full power of substitution. Nor is there any principle of law which can be cited as authority for holding that an attorney must be clothed with power of substitution at or before the time of making an assignment of the authority delegated to him by his principal or client. It is true that one who is attorney in fact, in some instances, requires more than the mere consent of the claimant to clothe another with authority to do the special thing or things which have been delegated to him to do by his principal. For instance, to convey a piece of land by deed; here the law requires that an agent to have power to perform the act his authority "must be conferred by an instrument of equal dignity and solemnity." (Am. and Eng. Ency., vol. 1, p. 337, 1st ed.) So, if he is also authorized by his principal to delegate his authority to another by power of substitution, this power must also be executed in the same manner as the execution of the deed.

An attorney in fact is a private or special agent appointed for some particular or definite purpose not connected with a proceeding at law, by a formal authority called a letter or power of attorney in which is expressed the particular act or acts for which he is appointed. (Am. and Eng. Ency., vol. 1, pp. 942 and 943, 1st ed.)

It is not thought, however, that in requiring an attorney's authority to prosecute a claim for pension to be evidenced by a power of attorney executed in the formula prescribed by the rules of practice, that an attorneyship in fact is thus created, or that it was the intent so to do. Otherwise the written consent of the claimant filed after the assignment of an attorneyship would not be required by the rules. So the requirements of law relative to the transference of an attorneyship in fact such as is cited are not applicable to the transfer of an attorneyship in a claim for pension. Yet the error was made in invoking those requirements as a test of the validity of an assignment of an attorneyship in claims for pension by one agent or attorney to another in pension claims.

In the report of your Bureau accompanying this appeal it is stated that:

The adoption of a rule holding that a transfer is operative where the claimant has given his consent to the same, whether the original power of attorney contained power of substitution or not, would be one in line of good practice and of equal justice to the Government, claimant, and attorney.

It is thought that the claimant's consent to the transfer of the attorney or agency in a case should be in the form prescribed by the present rules of practice. It is not deemed expedient to hold that this consent can be inferred from the cooperation of the claimant with the transferee, as the question of cooperation is necessarily one of fact to be determined from the proofs in each particular case and regarding which no rule can be laid down that would cover the multiplicity of cases that would necessarily arise. Furthermore, in every instance it can not be presumed that a claimant would be conscious of the fact that he was confirming an assignment of attorneyship by his act of cooperating with the transferee. The better practice is as the rule provides, viz, that the transferee file the written consent of the claimant to the assignment of the attorneyship to him. Accordingly the decision of the Department in the case of Esther Geddings, *supra*, and all other decisions of the Department in any way conflicting with the conclusion here reached are overruled and the action of the Bureau in denying the appellants a fee is reversed.

DIVISION OF PENSION—INSANITY—DESERTION—INTENT.

BURNHAM V. BURNHAM.

Where pensioner, at the date of his wife's application for one-half his pension under the first proviso of the act of March 3, 1899, and at the date of the alleged desertion, was adjudged insane, it is incumbent upon the wife, in order to establish desertion under said act, to show that her husband, at the date of the alleged desertion, was capable of understanding and entertaining an intent to desert her, as intent is an essential element in desertion. "Desertion begins with the intent to desert." *Martin v. Martin* (13 P. D., 430.)

Assistant Secretary M. W. Miller to the Commissioner of Pensions, September 3, 1903.

Eunice Burnham appealed August 10, 1903, from the Bureau action of July 11, 1903, rejecting her claim filed July 1, 1903, for one-half the pension of her husband, Simeon Burnham, a pensioner under certificate No. 642947, wherein the Bureau held that—

Pensioner can not be legally charged with marital desertion, he having been insane and so declared by a court of competent jurisdiction on the date of the alleged desertion. He was incompetent to form an intent and essential element in desertion.

Claimant contends in her said appeal that—

As a matter of fact the said Simeon Burnham above named has neglected to provide for the claimant herein, his wife, for over one year last past; that the degree of insanity on which his commitment to the insane asylum at Ogdensburg, N. Y., is based is of a very trivial character and was purposely anticipated with a view of punishing the claimant and force her to absent herself from the said pensioner, Simeon Burnham; that the treatment and care administered to the said Simeon Burnham at the time that he was declared insane was of such a nature as would cause insanity if continued any unreasonable length of time.

The committee of the person and estate of the said Simeon Burnham, who is A. W. Fairbanks, M. D., of Chazy, N. Y., has refused to contribute anything toward the support of the claimant herein, Eunice Burnham, although the said committee has received the said Simeon Burnham's pension money since he, the said Burnham, was declared incompetent; that said committee in so refusing to contribute anything toward the support of the claimant herein has done so in violation of the laws of the State of New York in such cases made and provided.

That claimant is in destitute circumstances, and although the said Simeon Burnham has been declared incompetent, he is not incapacitated to such an extent as to not realize the great injustice that is being done to the claimant herein by the refusal to have a portion of his pension money appropriated toward her support and maintenance.

It is therefore contended that this rejection is further illegal on the ground that the question of insanity has not been properly considered, nor did the claimant herein receive notice of the proceedings upon which the commission issued to the committee, A. W. Fairbanks.

A. W. Fairbanks, committee of the person and estate of said Simeon Burnham, in answer to said appeal, alleges as follows:

That the said Simeon Burnham previous to the 2d day of August, 1902, became insane and was committed to the St. Lawrence State Hospital, of which institution he is now an inmate; that the only desertion on the part of the said Simeon Burnham or his wife, Eunice Burnham, was the removal of said Simeon Burnham to the insane hospital at Ogdensburg, and that such desertion as decided by this Department was wholly involuntary on his part, and that at said time he was incompetent to form an intent and there was no desertion, as he had not sufficient mind at the time he was taken away.

Previous to the removal of said Burnham to the insane hospital he was deserted by the said Eunice Burnham, his wife, and it is claimed that such desertion in a measure produced such insane condition; that after the removal of said Burnham to the St. Lawrence State Hospital at Ogdensburg, upon a petition of Dr. William Mabon, the superintendent of said institution, the undersigned was by a competent court, and after due proof having been taken, appointed by an order of the county judge of Clinton County as committee of the said Simeon Burnham, which appointment bears date the 2d day of August, 1902; that the undersigned duly qualified as such committee and has been performing the duties thereof since said time; that the said Simeon Burnham was the owner of a small house and lot in the town of Chazy, N. Y., worth about \$300, and the same has been used and is in the possession of the said Eunice Burnham, with the income and avails thereof, since the said Simeon Burnham was adjudged insane.

Wherefore I ask that the appeal herein and all proceedings thereon be dismissed.

Claimant, in an affidavit of June 13, 1903, testified that her husband, the pensioner, was committed to an insane asylum at Ogdensburg,

N. Y., on or about June 15, 1902. In her declaration she alleged that she was married to pensioner in 1900, and that he deserted her about June 15, 1902. She also furnished the affidavits of two other witnesses who testified that pensioner was declared insane about the 15th of June, 1902, and was committed by order of the court to the St. Lawrence State hospital at Ogdensburg, N. Y.

It thus appears from claimant's own showing that at the date of the alleged desertion pensioner was adjudged insane.

An inquisition of lunacy, followed by confinement of the person adjudged insane, in an asylum, is *prima facie* evidence of his insanity, and the burden of proof is upon the party questioning his sanity. (2d Wharton on Evidence, 812.) As held in the case of *Leckey v. Cunningham* (56 Pa. St., 370):

The finding of an inquest of testamentary capacity is *prima facie* evidence of the want of it, and its effect is to shift the burden of proof to the party asserting capacity.

Where chronic insanity has supervened it is then a presumption of fact that it continues. (1st Wharton & Stillé's Med. Jurisprudence, par. 249.)

Where a person has been proved to be insane the presumption is that the insanity continues, and the burden of proof shifts to the party alleging sanity. (11 Am. & Eng. Ency. 1st ed., p. 160).

As stated by Clevenger in his recent work on Med. Jurisprudence of Insanity (Vol. 1, p. 393):

Desertion of or failure to support a wife by her husband, though made a ground for divorce by statute, is not so where it arises from insanity, citing *Baker v. Baker* (82 Ind., 146).

If general mental derangement be shown, the burden of proof is shifted upon those who assert mental capacity. *Jackson v. King* (4 Cowen, 207), 15 Am. Dec. (354 and notes), *Jackson v. Van Dusen* (5 Johnson, 144), 4th Am. Dec. (330 and notes).

The intent and motive of a party are necessary ingredients to the offense of desertion, and such intent can not be held to exist where legal insanity is established. The question whether the insanity of a husband will excuse acts of cruelty or desertion depends upon whether he was capable of understanding the nature and consequences of the acts charged at the time of their commission. As was held in the case of *Martin v. Martin* (13 P. D., 430), "Desertion begins with the intent to desert."

Where a pensioner at the date of his wife's application for one-half his pension, under the first proviso of the act of March 3, 1899, and at the date of the alleged desertion, was adjudged insane, it is incumbent upon the wife in order to establish his desertion under said act to show that her said husband, at the date of the alleged desertion, was capable of understanding and entertaining an intent to desert her, as intent is an essential element in desertion.

As claimant in this case has failed to show that her husband was at the date of the alleged desertion, June 15, 1902, mentally capable of entertaining an intent to desert her, the action of the Bureau is affirmed.

RESTORATION—ACT OF MARCH 3, 1901—REMARRIAGE—DROPPING.

ISABELLA WINFIELD (WIDOW.)

The act of March 3, 1901, relates only to the title and status of widows whose names have been dropped from the pension rolls because of their remarriage, and has no application to widows whose names were dropped under section 4706 of the Revised Statutes.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, October 12, 1903.

This is a motion, filed October 1, 1903, for reconsideration of departmental decision of August 17, 1903, affirming rejection, November 12, 1901, of claim of Isabella; former widow of James C. Winfield, Battery E, Eighth United States Artillery (14 P. D., 128), for restoration, under the act of March 3, 1901, of pension as his widow allowed her and paid to September 4, 1868, when she was dropped from the rolls under the act of July 27, 1868, section 8 (now section 4706, Revised Statutes), and payments were continued to Deborah A. Benedict, as guardian of the soldier's minor child, to August 30, 1878, the date said child became 16 years of age.

The contentions of this motion are substantially the same as those contained in the original appeal herein. The gist of these contentions is that this claimant should be considered, under the law, as constructively upon the rolls up to the date of her remarriage in 1870, and constructively dropped from said rolls, by reason of such remarriage, on that date, thus bringing her, by construction, within the purview of the provision of said act of March 3, 1901—

that any widow * * * whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person, who has since died or shall hereafter die * * * shall be entitled to have her name again placed on the pension roll.

This theory of a constructive retention upon the pension rolls and of a constructive dropping therefrom of the claimant's name can not be sustained. It is, as stated in said decision of August 17, 1903, "unqualifiedly contrary to the fact in the case." Under said act of July 27, 1868, appellant was dropped from the rolls because of her willful abandonment of said child; a new certificate, placing said child (by guardian) upon the rolls, was issued, and appellant was never restored to said rolls, and never had any title, inchoate or other, restoration after her remarriage. Her name was off the rolls,

not only in fact but in law, from the date when it was dropped and said child's substituted in 1868. Up to her remarriage she had a mere expectancy of a future title to pension, dependent upon her surviving the minority of said child, and upon her not remarrying; but she no longer possessed any present title to pension, and was not upon the pension roll either, as stated, in fact or in law. Her status was no better than that of a wife as regards a widow's pension, title to which might never arise because she might not survive her husband, or, though surviving, have been divorced.

No error in the decision of August 17, 1903, is apparent, and it is adhered to. This motion is overruled.

HONORABLE DISCHARGE—SPECIAL ACT—ACT JANUARY 29, 1887.

THOMAS J. MORMAN.

The records of the War Department showing that claimant was honorably discharged from the service in the war with Mexico, the Commissioner of Pensions has no lawful authority to question such record, and must accept the fact as certified to him by the Secretary of War.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, October 17, 1903.

Thomas J. Morman, formerly private in Captain Goulding's Company (A), Calhoun's Mounted Battalion, Georgia Volunteers, war with Mexico, filed a claim for pension under the act of January 29, 1887, May 8, 1889, which was rejected September 10, 1892, on the ground that claimant did not receive an honorable discharge, as required by said act. February 18, 1903, the following act of Congress was approved:

That the Secretary of War be, and is hereby, authorized to correct the military record of Thomas J. Morman, Capt. E. R. Goulding's Company, Calhoun's Mounted Battalion, Georgia Volunteers, Mexican war, and grant him an honorable discharge as of date of June 1, 1848.

In accordance with the above an honorable discharge was granted the claimant by the Secretary of War, which fact was duly certified to the Commissioner of Pensions.

July 25, 1903, the claim was again rejected in the following language:

Approved for rejection on the ground that the claimant has no title to pension under the act of January 29, 1887, as he was dishonorably discharged from his service in the war with Mexico by sentence of general court-martial, as shown by the records of the War Department. It is held that subsequent legislation does not operate to change the above status. (See opinion of the honorable Commissioner of Pensions attached to brief. An appeal from the above action lies to the honorable Secretary of the Interior.)

September 4, 1903, the claimant, by his attorneys, filed an appeal to the Department, contending that the Commissioner of Pensions was in error in his application of the law in the case.

The Commissioner of Pensions holds, in substance, that Congress exceeded its power in granting an honorable discharge in this case, and that the status of the claimant as a dishonorably discharged soldier was not changed by the special act of Congress above referred to. Thus is raised the question of the constitutionality of said act. Little need be said on this contention. This Department has refused repeatedly in land cases to consider the constitutionality of acts of Congress which it has been called upon to execute.

In the case of *Snow v. Northey* (19 L. D., 493) the Secretary said:

The Department seeks to execute the laws as passed and approved; the questions relating to their constitutionality have no place in the executive branches of the Government and can not therefore be considered here.

Again, in re *William A. Barnes* (22 L. D., 196), it was held:

Executive orders promulgated by the President and acts of Congress are presumably constitutional and will be so regarded by this Department until declared unconstitutional by a court of competent jurisdiction.

In a claim for pension, should a constitutional question be squarely presented, the Department sees no good reason why the rule laid down in the above-cited decisions should not be adhered to.

The fact is, however, that the Commissioner of Pensions had no constitutional question presented to him in this case.

In the case of *Samuel Everman* (1 P. D., 418) the Department held:

The records of the War Department, as far as they go, must be taken as furnishing the correct history of the military service of a claimant for pension, and it is in the power of neither the Commissioner of Pensions nor the Secretary of the Interior to alter such records.

In the case of *Syprian Archambault* (6 P. D., 240), it was held:

It is exclusively within the jurisdiction of the War Department to amend, alter, and correct the record of service, and on said record, when completed, the Interior Department is authorized to determine the pensionable status of the soldier under the law.

In other words, the Commissioner of Pensions and the Department are bound to follow the records of the War Department in cases where such records show the fact of enlistment and discharge. If the records of the War Department in any given case show that a soldier was honorably discharged it certainly is not within the power of this Department to declare that the records show something entirely different. If the record is erroneous, application must be made to the War Department to change it. That is the only method in which they may be amended or altered. Congress has frequently passed general laws regarding the removal of desertion standing against soldiers, and records when so corrected have always been recognized as conclusive by this Department. (See acts of Aug. 7, 1882; July 5, 1884; May 17, 1886; August 14, 1888, and March 2, 1889.) Under these laws soldiers against whose honorable military service charges of desertion have

stood upon the records of the War Department since the war with Mexico have had said charges removed by the Secretary of War, and have been duly pensioned without question. It would seem that the authority which can direct that the Secretary of War be authorized to correct records generally upon evidence satisfactory to him certainly has power in a particular case to direct that a military record shall be corrected to conform to what it believes to be the facts in such case. (See Senate Report No. 2861, 57th Cong., 2d sess.)

At all events, in this case the records of the War Department do show that the claimant was honorably discharged June 1, 1848. The duty of the Commissioner of Pensions was clear and unmistakable when that fact appeared of record.

The act of January 29, 1887, under which this claimant applied contains the following provision:

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll the names of the surviving officers and enlisted men, including marines, militia, and volunteers, of the military and naval services of the United States, who being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto, in the war with that nation, or were actually engaged in battle in said war, and were honorably discharged, and to such other officers and soldiers and sailors as may have been personally named in any resolution of Congress for any specific service in said war, and the surviving widow of such officers and enlisted men. * * *

The records of the War Department show that the claimant enlisted September 1, 1847, and was honorably discharged June 1, 1848, and that he served more than sixty days in Mexico during the war. Where in the statute is there any discretion, either expressed or implied, vested in the Commissioner of Pensions? When the above facts are shown he can do nothing but carry out the law.

If anything else were needed to point the way to the Commissioner's duty in such a case as is here presented, it is found in the third section of the act of January 29, 1887, which is in part as follows:

The loss of the certificate of discharge shall not deprive any person of the benefits of this act, but other record evidence of enlistment and service and of an honorable discharge may be deemed sufficient.

Is there not record evidence that this claimant was honorably discharged?

When the Secretary of War issued an honorable discharge to this claimant in response to the direction of the special act of Congress, and certified the fact that the records of his Department were corrected to show such honorable discharge, it was not within the lawful power of the Commissioner of Pensions or of this Department to question such a record. The Commissioner's duty begins and ends with the statute which fixed the pensionable status of the claimant. Whenever the records of the War Department show that a claimant had such service in the Mexican war and was honorably discharged as to entitle

him to a pension under the provisions of the statute the Commissioner of Pensions should have issued to him a certificate. (See case of Joseph C. Williams, 7 P. D., 218.)

The special act in this case is only collaterally involved in the adjudication of the claim under consideration. The Secretary of War having obeyed the mandate of Congress by issuing the claimant an honorable discharge, it certainly does not come within the province of this Department, nor of any official thereof, to question his right to issue such a discharge.

Therefore, the action of the Commissioner of Pensions in refusing to recognize that claimant was honorably discharged from service in the Mexican war, as shown by the records of the War Department, was error, and said action is reversed, and the papers are returned herewith for readjudication of the claim in conformity with this opinion.

RESTORATION—ACT MARCH 3, 1901—DIVORCE.

LAURA A. INGALLS (WIDOW).

Claimant's second husband secured a divorce from her on his application prior to the date of the passage of the act of March 3, 1901. The divorce subsequently secured on her own application is without force and effect and is not valid. Action affirmed.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, October 20, 1903.

Laura A. Northway, formerly the widow of John P. Ingalls, of Company B, Twenty-fifth Michigan Volunteer Infantry, and pensioned as such until her remarriage, January 1, 1868, applied for restoration under the act of March 3, 1901, July 19, 1901.

September 9, 1901, the Bureau rejected this claim on the ground that—

The divorce from claimant's second husband was procured by him—not divorced upon her own application.

In this action the claimant acquiesced. The records in the case show that by decree of the circuit court of the State of Michigan, for the county of Ionia, in chancery, the marriage between this claimant and her second husband was dissolved, and that on appeal to the supreme court of Michigan, in which this claimant was "defendant and appellant," said decree, February 16, 1898, was "in all things affirmed."

April 22, 1902, this claimant filed a new application which was a duplicate of her former application, with the exception that, in regard to the dissolution of her second marriage; in this one she alleged "that she was divorced from said husband upon her own application and

without fault on her part, on the 25th day of March, 1902, at Big Rapids, Mich." Accompanying this application was a certified copy of a decree of divorce, a vinculo, pro confesso, granted in the circuit court of Michigan, for the county of Mecosta, on the date alleged, in which this claimant was complainant.

This application the Bureau refused to consider, and by letter of May 7, 1902, informed the claimant of the grounds for such refusal, i. e., that said application was a duplicate of the one rejected, and that the validity of the divorce granted by the court of Mecosta County was not recognized.

June 28, 1902, from this refusal the claimant appealed to the Department, contending that she came under the provisions of the act of March 3, 1901, "by being afterwards divorced upon my (her) own application."

That the Bureau's refusal to consider this application, under the circumstances, was entirely proper is so apparent as to hardly warrant such an assertion by the Department.

The divorce alleged in this claim is not only a nullity, with absolutely no force and effect, but it is also evidently a fraud on the court by which it was granted, and an attempt at fraud on the Government. The marriage which it was meant to annul had been dissolved by a court of competent jurisdiction prior to the date on which the bill of complaint was filed by this claimant, and at the date of filing same the defendant named therein was as free from the obligation of marriage between himself and this complainant as was the judge on whom the hearing of this cause was imposed, or as was anyone else who was or had been in no way connected with her. The appellant was divorced from her second husband on his motion, and not without fault on her part, and she therefore has no title to benefit under the act of March 3, 1901.

Action affirmed.

FEE—WIDOW AND MINOR—DIFFICULTY AND TROUBLE.

MARY A. BURNS (CLAIMANT).

JAMES P. L. WEEMS (ATTORNEY).

In a widow's claim for pension under the general law, a fee in excess of \$10 can not be paid an attorney for securing increase on account of a minor child, unless the prosecution of the claim, in the opinion of the Commissioner of Pensions, involves such difficulty and trouble as warrants him to allow a fee in excess of \$10, wherein articles of agreement are filed which he approves.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
October 26, 1903.*

James P. L. Weems, of Vincennes, Ind., on June 22, 1903, entered an appeal from the action of the Bureau in the matter of fee on the supplemental issue of April 4, 1903, in the claim for pension under

the general law of Mary A. Burns, as widow of David W. Burns, who served in Company F, Forty-second Indiana Volunteer Infantry, to allow increase on account of Losia V. Burns (now Faith), child of the soldier by a former marriage, and payable to such child.

June 7, 1889, there was filed in behalf of Mary A. Burns, as widow of the above-named soldier, a declaration for pension under the general law, and certificate issued May 20, 1890, to allow pension in the claim to the widow at \$12 per month, and, in addition, \$2 on account of each of her children by the soldier, Claud and David. On this issue a fee of \$25 was paid to Noah Moser, of Loogootee, Ind. She was so in receipt of pension, when, on September 5, 1890, in behalf of Losia V. Burns (now Faith), the appellant filed a declaration for pension on her account as minor child of the soldier by a former marriage, not in the care and custody of the widow. He filed the evidence adduced in the claim, and on September 5, 1890, filed articles of agreement stipulating for the payment of a fee of \$25.

There was a supplemental issue April 4, 1903, in the claim to allow to Losia V. Burns (now Faith), as minor child of the soldier, pension at \$2 per month from August 7, 1887, date of his death, payable to said minor. On this issue a fee of \$10 was paid to Mr. Weems. From this action an appeal is entered with the contention that a fee of \$25 should be certified to him under articles of agreement filed September 25, 1890.

The several applications in behalf of the widow and minor children of a soldier for pension to which the widow may be entitled in her own right constitute the basis of one claim (*Da ya ne Ah Kee la nee gar*, 10 P. D., 146). The entire pension allowed in this case is such pension as widows of soldiers may be entitled to under the provisions of the general law (sections 4702-4703, United States Revised Statutes). Where the claim is prosecuted by one attorney representing the widow and by another representing a minor child to whom or to whose guardian, pension on its account is paid, a fee may be allowed to the one for securing the pension paid to the widow and also a fee paid to the other for securing the pension paid to such minor child (minors of Louis Ollendorf, 8 P. D., 272, and cases there cited).

The law relative to the amount of fee that shall be paid to an attorney for his service in securing increase of pension in a widow's claim on account of a minor child of a soldier, whether payable to the widow or to such minor child, when said attorney was not paid a fee on the original issue in the claim, is that—

In all cases when application is made for pension * * * and no agreement is filed with the Commissioner of Pensions as herein provided, the fee shall be \$10 and no more. (Section 4, of the act of July 4, 1884.)

In this case it is true that articles of agreement were filed by the appellant, but the filing thereof was not authorized by the statute.

The class of claims to which the present case belongs is not mentioned in those classes of claims specified in the statute in which is not left to the discretion of the Commissioner of Pensions, the recognition of articles of agreements when filed, nor one of the class in which he has such discretion when such difficulty and trouble is involved in the prosecution thereof as to warrant, in his opinion, the recognition of articles of agreement. That the present claim is not one of the last-mentioned class is evidenced by the fact that the Commissioner of Pensions refused to recognize the articles of agreement filed herein by the appellant.

No facts are set forth in the appeal which warrant the belief that any gross injustice has been done by the Commissioner of Pensions in refusing to recognize the articles of agreement filed in the claim, and, therefore, his action in declining to recognize them is deemed proper. (Syllabus, Annie Higgins, 11 P. D., 519.) Accordingly the action of the Bureau in refusing to certify a fee under the articles of agreement filed in the claim is affirmed.

PATHOLOGICAL SEQUENCE—CATARRH AND BRONCHITIS—PRACTICE.

WILLIAM H. CARR.

Chronic nasopharyngeal catarrh was the only existing affection of the respiratory organs, and bronchitis is not accepted as a result thereof, but rather the result of disease of heart. Under the evidence and the practice of the Bureau the approval for disease of the respiratory organs was too broad and not warranted.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
October 26, 1903.*

Under date of August 13, 1903, the Department rendered a decision in the case of the above-named soldier affirming the action of July 11, 1902, in which his claim for increase of pension was rejected. He is now receiving \$12 per month on account of disease of respiratory organs and chronic diarrhea and resulting disease of rectum.

The Department showed in its decision that the term disease of respiratory organs is indefinite; that the specific affection of said organs for which pension was in part allowed is chronic nasopharyngeal catarrh; that no other affection of the respiratory apparatus was described in the reports of the official examinations covering the period of eleven years from the first medical examination of the claimant; that the certificate of a later examination showed he was suffering from chronic rheumatism and organic disease of the heart; that the certificates of subsequent examinations showed the existence of chronic bronchitis and asthma, which were properly attributed to the affection of the heart.

On September 28, 1903, the recognized attorney filed a motion for reconsideration of the aforesaid decision. He calls attention to the fact that although the soldier alleged in his original application that while in the service he became afflicted with chronic diarrhea and bronchitis, his disabilities were denominated in his pension certificate as disease of respiratory organs and chronic diarrhea and resulting disease of rectum. He contends "that it is his (the claimant's) privilege to avail himself of all the term disease of respiratory organs implies—affection of the nose, pharynx, larynx, trachea, bronchi, and lungs—as long as he has said diseased organs in a pensionable degree;" that if at one time all of said organs were not involved it should not be held that subsequently they could not be involved as a result; that "it is not right to ignore the findings and rates" of the board of examining surgeons.

As stated above, the Department in its decision pointed out that the pension was in part allowed for chronic nasopharyngeal catarrh under the broad indefinite approval for disease of respiratory organs. The claimant's specific allegation that while in service he became afflicted with bronchitis was not overlooked. The reports of the official examinations made in 1887 and 1892, prior to the adjudication and allowance of the claim, were cited in the decision as showing that the lungs were normal, and that chronic nasopharyngeal catarrh was the only existing affection of the respiratory organs. The report of the next examination, made in 1898, was cited as showing that the lungs were still in a normal condition at that time. No evidences of bronchitis were shown by any of these reports. It was not until 1900 that any evidences of such affection were presented. At this time the bronchitis was undoubtedly due to the organic disease of heart with failing compensation, for it is a well-known clinical fact (as stated in said decision) that bronchitis always accompanies this condition.

If this claimant had been held strictly to his allegation, the part of his claim relating to bronchitis should have been rejected upon the ground that no disability was shown from that specific affection. Claimants are not, however, required to make a technical and correct diagnosis of their disabilities, but the evidence and official reports of medical examinations must warrant a definite approval for some particular disability or disabilities. This rule has prevailed for many years in the adjudication of claims for pension (see *Treatise on Practice*, editions of 1882 and 1898), and it was again set forth in an order issued August 7, 1899, by your predecessor. In this order it is stated:

"Affection of back," for example, would cover any disability of whatever nature found, either of the nerves, muscles, tendons, vertebrae, or spinal cord, and disabilities not shown to be of service origin.

An approval for "disease of chest," likewise would cover any affection of lungs, bronchial tubes, pleura, heart, or of the blood vessels of chest.

It is desired that legal approval in such cases be confined to the specific disability shown to have been incurred during the soldier's military service and not so general as to include other diseases which may have been contracted years after discharge.

Notwithstanding the rule, it appears that there was much freedom in the approval of claims at and about the time this one was adjudicated (1892). While the official certificates warranted an allowance for nasopharyngeal catarrh under the allegation of bronchitis, the claim was broadly approved for disease of respiratory organs. This practice was wrong, and especial care should be taken to avoid approvals of such a broad and general character.

The attorney's contention in this case that it is the claimant's privilege to avail himself of all the term disease of respiratory organs implies is not tenable. The claimant is only entitled to pension for the disability which was accepted as of service origin, to wit, nasopharyngeal catarrh and any direct pathological results thereof. No such results were shown, however. He is not entitled to additional pension on account of the existing bronchitis and asthma, for it is clear that these affections are directly due to the disease of heart and have no possible pathological relation to the bronchitis he alleged he incurred in service or the nasopharyngeal catarrh which alone was shown.

The second contention has no direct application in this case, and, moreover, it is not tenable. It was not held that the nasopharyngeal catarrh could not involve other parts. The Department stated that the increased disability is shown to be due to causes independent of those for which the claimant is pensioned; that the existing bronchitis is due to disease of heart and not to the nasopharyngeal catarrh.

The third contention in regard to the findings and rates of the board of examining surgeons is fallacious. Such findings and rates are mere expressions of individual opinions. The Department can not be bound by such opinions, but they are duly considered in connection with the established facts.

After a careful review of the evidence there appears no ground for further action, and the motion for reconsideration is therefore overruled.

LINE OF DUTY—ACCIDENTAL INJURY—PISTOL WOUND—NEGLIGENCE.

JOSEPH HEIMKEL.

The soldier was wounded by the accidental discharge of a revolver while cleaning it in quarters, he not knowing that it was loaded. The Army Regulations prohibit the taking of loaded weapons to quarters, but it does not appear that he knowingly and willfully disobeyed regulations, or was guilty of culpable or gross negligence in handling the weapon. It is, therefore, held that the wound was incurred in line of duty.

This appellant, Joseph Heimkel, served from March 23, 1896, to January 2, 1897, as a private in Troop F, Seventh United States

Cavalry, and applied for pension under the general law on January 16 following his discharge, claim No. 1184975. In his declaration he alleged the incurrence of a gunshot wound on September 12, 1896, "while cleaning his pistol." His claim was rejected February 17, 1902, as follows:

Approved for rejection for gunshot wound of left hand on the ground that said disability was not incurred in line of duty, but due to the soldier's carelessness and violation of Army Regulations (par. 276 A. R., 1895), as shown by the records of the War Department.

The records on file with the War Department show that the soldier was admitted to the hospital September 12, 1896, and was treated for a gunshot wound of hand incurred "in line of duty."

The soldier was discharged because of disability, the result of this wound, as appears by the following:

Became unfit for duty from present disease or injury (date): September 12, 1896.

Disease contracted or injury received (date and place): September 12, 1896.

When disability arose soldier was (state duty or service): Performing duty of a private of the troop.

Cause of disease or injury, or circumstances under which it appeared was as follows: Accidental discharge of revolver while cleaning it after the regular revolver practice of the troop of that day.

Disability was incurred in line of duty.

This accident occurred in the troop barracks shortly after the return of the troop from the target range September 12, 1896, and in the presence of a number of men of the troop.

H. G. SICKEL,

Captain, Seventh Cavalry, Commanding Troop F.

Station, Fort Grant, Ariz.

Date, December 17, 1896.

I certify that I have carefully examined the above-named soldier and find him incapable of performing the duties of a soldier because of partial stiffness of little finger and partial loss of motion of ring and middle fingers left hand caused by injury to fascia and small nerves of palm of hand, thus incapacitating, result of gunshot wound received while cleaning loaded revolver due to carelessness.

Opinion as to cause of disability and if incurred in line of duty based on history and progress of case.

Cause as above. War Department authorities decide that injury received in this manner is in line of duty.

Therefore incurred in line of duty.

Length of time case has been under observation: Three months.

In view of occupation to what extent is he disabled from earning subsistence? (1) one-eighth.

EDWIN F. GARDNER,

Major, Surgeon, U. S. Army, Post Surgeon.

The statement of the post surgeon that the injury was due to the soldier's carelessness was the cause of an official inquiry by the Adjutant-General, as is shown by the following correspondence:

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, January 11, 1897.

COMMANDING OFFICER, *Fort Grant, Ariz.*

(Through headquarters Department of the Colorado.)

SIR: In the case of Joseph Heimkel, late private of Troop F, Seventh Cavalry, who was discharged January 2, 1897, at Fort Grant, Ariz., on surgeon's certificate of disability, the following discrepancy between the report of the troop commander and the surgeon is observed, viz: The troop commander certifies that the soldier received a gunshot wound in left hand by the accidental discharge of a revolver while cleaning it after the regular revolver practice of the troop. The accident occurred in the troop barracks shortly after the return of the troop from the target range and in the presence of a number of men of the troop. Disability in line of duty.

The surgeon describes the injury and its results, but reports that the gunshot wound received was due to carelessness.

In view of the fact that the troop commander, who should be in possession of all the facts in the case, has in no manner indicated that the injury was due to carelessness, but, on the contrary, has certified that it was accidental, the Major-General Commanding the Army directs that a report be furnished which will contain the source from which the surgeon obtained the knowledge—not possessed by the troop commander—that the injury was due to carelessness.

It is proper to state that this remark on the certificate clouds the soldier's title to a pension and should not be made without full investigation.

Very respectfully,

J. B. BABCOCK,
Assistant Adjutant-General.

FORT GRANT, ARIZ., *January 21, 1897.*

The ADJUTANT.

SIR: In compliance with the instructions contained in the within communication from the Adjutant-General's Office, dated 11th instant, relative to the certificates of disability in the case of Joseph Heimkel, late private, Troop F, Seventh Cavalry, I have the honor to report as follows:

My opinion that this injury was due to carelessness is based on inquiries which I made of the man while he was under treatment in the hospital. He was asked if he did not know better than to attempt to clean a loaded revolver. He replied that he did, but that he had forgotten that the revolver was loaded. Being asked if he had not been instructed in the management of his revolver and if there were not regulations which, if observed, would prevent his trying to clean a loaded revolver, he replied that he had been so instructed, but that he had forgotten to take the loads out on returning from target practice, admitting also that this was required by regulations.

This is the purport of my questions and his answers; the exact language, of course, I can not quote.

The injury was, therefore, received while he was cleaning a revolver which he did not know was loaded, in violation of all the dictates of common caution, and the fact that the revolver was loaded was due to his disregard or to his forgetfulness of the instructions which he had received. If this be not carelessness, I am at a loss for a term by which it may be characterized.

My statement on the certificate of disability was not made thoughtlessly, but with due consideration, and with a knowledge of the fact that it might cloud his claim to a pension, and if his claim to a pension be clouded by a correct statement of the matter the fault must lie in the circumstances of the case and not with the officer making the statement.

It may be noted that the certificate of the troop commander does not state either that the accident was unavoidable or that it was due to carelessness. Possibly, if the matter were referred to him, his opinion would not be at variance with mine. However that may be, I am unable to change my opinion that this injury was received through the inexcusable carelessness of the man himself.

Very respectfully, your obedient servant,

EDWIN F. GARDNER,
Major and Surgeon, U. S. Army, Surgeon.

* * * *

[Fifth indorsement.]

TROOP F, SEVENTH CAVALRY,
For Grant, Ariz., January 23, 1897.

Respectfully returned * * *. My certificate that the injury was accidental was correct in that the injury was unforeseen and not expected and in no sense intentional. It was in line of duty, following decisions in similar cases and recent occurrences, viz, Private William H. McKay, Troop C, Seventh Cavalry, and Private John A. Thompson, Troop F, Seventh Cavalry. This man was certainly performing a military and a necessary duty in cleaning his revolver. It may be considered the result of carelessness under the provisions of paragraph 276, A. R., 1895 (paragraph 268, A. R., 1889), which provides, "Pieces will be unloaded before being taken to quarters or tents, etc." This regulation is printed in the "Soldier's Hand Book," and was before the accident, and is still, posted in writing on a bulletin board in the troop quarters, so that there can be no excuse for any man having a loaded firearm in the troop quarters at any time.

I was absent from the post on leave at the time of this accident, and therefore have no personal knowledge of the facts. I made my certificate on reports made to me by Second Lieut. Robert Sewell, Seventh Cavalry, and the first sergeant of my troop.

H. G. SICKEL,
Captain, Seventh Cavalry, Commanding Troop F.

* * * *

[Eighth indorsement.] *

HEADQUARTERS DEPARTMENT OF THE COLORADO,
CHIEF SURGEON'S OFFICE,
Denver, Colo., January 23, 1897.

Respectfully returned * * *. In my judgment there is but one view to be taken of this accident, namely, that it was the result of carelessness, and the medical officer, recognizing that fact, is bound to so state. The ruling of the War Department that the accidental discharge of loaded firearms in company quarters while being cleaned is technically in the line of duty does not, in my judgment, absolve the medical officer from expressing his own official opinion that it is a careless act.

A. WOODHULL,
Lieutenant-Colonel, Deputy Surgeon-General, Chief Surgeon.

The rejection of this claim by the Bureau was based upon the soldier's carelessness and apparent violation of the army regulations requiring that firearms should be unloaded before being taken to quarters.

A rejection on this ground alone, however, in view of the facts in this case, is certainly erroneous.

It is true, and the Department has held, that an injury received where a soldier was proceeding in violation of orders, army regulations, or of law is incurred without the line of duty; but the facts in the cases where this question was discussed showed willful disobedience of orders or army regulations—that is, the claimants knowingly and disobediently placed themselves without the line of duty. The rule laid down in the case of George M. Brown (3 P. D., 29) has been generally followed in late decisions. In that case it was held:

The line of duty in service is adverse to acts that are forbidden by properly authorized superior officers and that are in violation of military discipline; nor should a claim for pension be granted for disability incurred as the result of a claimant's own willful wrongdoing.

An examination of the various decisions of the Department shows that violation of orders or of military discipline must be intentional or willful before it will be assumed that the soldier is without the line of duty. In the case now under consideration it appears that such was not a fact. In his sworn appeal the claimant says:

After firing at target he took his place in the rear of the line and reloaded his revolver, with the expectation that he would again fire at the target, no order to the contrary having been given. The general rule when practice ceased was the giving of the orders, "Unload," "March." On this occasion there was no order given to unload, but order was suddenly given, "Fall in," "March;" that being under marching orders he could not unload his revolver on the way to the stables; before reaching the stables the dinner call was sounded. He being detailed as stable guard and knowing that inspection was to take place at 2 o'clock threw the cylinder of his revolver and dumped the cartridges in his hand, supposing that all the cartridges had been removed; that it was about one-half hour before he was relieved from duty as stable guard, and he did not have to exceed an hour and a half to get his dinner and prepare himself for inspection; that his revolver was the last thing he was cleaning preparatory to inspection, when it was accidentally discharged, the ball passing through the left hand.

While this statement in all its details is not corroborated by the record or by the letters of the captain and post surgeon, yet it is not contradicted by other evidence on file and in its material features is corroborated by the whole evidence. It satisfactorily appears that the soldier was engaged in an act incident to duty and was in his proper place when wounded. It further appears that he did not knowingly and intentionally violate the Army Regulations in taking a loaded revolver to quarters.

Thus, there was no willful violation of the Army Regulations, and the soldier did not knowingly take himself without the line of duty or intentionally commit an act contrary to military discipline.

This fact distinguishes this case from many others determined by the Department and excludes it from the purview of the rule in the Brown case.

It having been determined that the technical violation of the Army Regulations did not place the soldier without the line of duty, and it being clear that the cleaning of his revolver in quarters was not in itself a violation of military discipline, but was in fact the performance of a soldier's duty, it remains to be seen to what extent his negligence in leaving a load in the revolver militates against his claim. That he was careless in the handling of a deadly weapon there can be no doubt, as care on his part would have prevented the accident and consequent disability. It is a well-recognized fact that men are fallible, and the constant and familiar use of firearms leads to an indifference and heedlessness that may or may not amount to gross or culpable negligence. The Department in considering similar cases has adopted the Illinois doctrine of degrees of negligence. In the case of Chalkley, alias T. C. Milnourn (2 P. D., 360), it was held:

The negligence on the part of a soldier which is sufficient to take his case out of the line of duty must be shown to have been of such a character as is recognized as gross negligence, which is defined (1 Chitty on Contracts, 662) to be "that want of care which every man of common sense, however inattentive, takes of his own property or person."

That this claimant was not guilty of gross negligence is shown by the fact that he unloaded his revolver, as he thought, before entering his quarters, though there was a degree of negligence in not examining his weapon carefully to see that all the loads had been withdrawn; this oversight, however, was mere inattention, and under the circumstances can not be construed as gross or willful negligence. In fact, the claimant's injury was due to an accident, not absolutely an unavoidable one, but one that is not unusual in the handling of firearms and the danger of which is incidental to the duties of a soldier. That a disability incurred under such circumstances creates a pensionable status has been recognized by the Department in a number of instances; and in the case of Joab Truce (3 P. D., 14), the facts of which were very similar to those under consideration, it was held that a pistol wound caused by the accidental discharge of the weapon while the soldier was engaged in cleaning it, being unattended by "culpable or contributory negligence," was "purely accidental and ascribed to a legitimate connection with line of duty."

The evidence in this case shows that the soldier was engaged in a necessary military duty when wounded, and was not guilty of gross or culpable negligence in the handling of his weapon; nor does it show that he willfully or knowingly violated any order or army regulation, thus disobediently placing himself without the line. His wound was incurred in line of duty, and the rejection of his claim on the grounds assigned was erroneous, and said action is reversed.

COMMENCEMENT—ACT OF MARCH 4, 1890—AID AND ATTENDANCE.

JOHN C. STEVENS.

Where an application for original invalid pension was filed subsequent to March 4, 1890, and the claimant was, at the date of filing such application, so totally and permanently helpless from injuries received or disease contracted in the service and line of duty as to require the regular personal aid and attendance of another person, he is entitled to receive the rate of \$72 per month from said date (of filing the application).

The appellant, John C. Stevens, late a private in Company M, Thirteenth United States Infantry, enlisted in said organization November 30, 1898, and was discharged March 6, 1901, and on March 23, 1901, filed a claim for invalid pension, alleging that while in the service, as aforesaid, at San Pedro Macati, P. I., about July, 1899, he contracted dysentery and malarial fever (resulting in chronic malarial poisoning), rheumatism, and constipation, followed by myelitis and resulting ankylosis of the joints, atrophy of the muscles, paralysis, and general debility, whereby he had become disabled to such a degree that he required the regular aid and attendance of another person.

By a certificate issued July 8, 1901, he was granted a pension for rheumatism (no other disabling cause being admitted), at the rate of \$30 per month from March 23, 1901, to May 25, 1901, and \$72 per month thereafter.

On August 24, 1901, he filed a claim for rerating, contending that he was entitled to the \$72 rate from the date of filing his application, inasmuch as he was then so disabled as to require the regular aid and attendance of another person and had been so disabled ever since. That claim was rejected in March, 1902, on the ground that "the \$72 rate was given from the proper date under the law." From that action an appeal was taken May 6, 1903.

The evidence shows that the claimant was discharged from service on account of "complete loss of use of both lower extremities and much impaired use of both upper extremities, due to arthritis deformans following articular rheumatism," and that he was in the same helpless condition when medically examined on May 25, 1901, the date from which the \$72 was allowed. There is no dispute as to the fact that he was helpless in a degree requiring the regular aid and attendance of another person at the time of filing his application, and continuously thereafter to the date of his medical examination. The refusal of the Bureau to allow the \$72 rate from the date of the application is based upon the language of the act of March 4, 1890, which, omitting the enacting clause, reads as follows:

That all soldiers, sailors, and marines who have since the sixteenth day of June, eighteen hundred and eighty, or who may hereafter become so totally and permanently helpless from injuries received or disease contracted in the service and line

of duty as to require the regular personal aid and attendance of another person, or who, if otherwise entitled, were excluded from the provisions of "An act to increase pensions of certain pensioned soldiers and sailors who are utterly helpless from injuries received or disease contracted while in the United States service," approved June sixteenth, eighteen hundred and eighty, shall be entitled to receive a pension at the rate of seventy-two dollars per month from the date of the passage of this act or of the certificate of the examining surgeon or board of surgeons showing such degree of disability made subsequent to the passage of this act.

It appears to have been held by the Bureau that under this act the rate of \$72 can be allowed to commence only from one of two dates—the date of the passage of the act or the date of the certificate of a medical examination made subsequent to the passage of the act.

After due consideration the Department is unable to concur in this view of the law.

The provisions of the act of March 4, 1890, must be construed in connection with other laws in *pari materia*. The act of March 3, 1879, provided that in all cases in which the application should be filed on or after July 1, 1880, the pension, if allowed, should commence from the date of filing the application, and that in the payment of arrears the rate should be "graded according to the degree of the pensioner's disability from time to time and the provisions of the pension laws in force over the period for which the arrears shall be computed." This soldier's claim was filed on March 23, 1901. The laws then in force provided for the degree of disability from which he was suffering the rate of \$72 per month. Under the general rule established by the act of March 3, 1879, he would, therefore, be entitled to \$72 per month from the date of filing his application, just as, if his disability were merely equivalent to the loss of a hand or foot, he would be entitled to \$24 per month from that date, or, if he were wholly incapacitated for manual labor, to \$30 per month from said date.

Unless there can be clearly discerned in the act of March 4, 1890, a purpose to make the allowance of the \$72 rate thereunder an exception to the general rule as to commencement, we are justified by well-known canons of construction in assuming that no innovation in that respect was intended. In the opinion of the Department there is no clear manifestation of such a purpose. The language of the act "shall be entitled to receive a pension at the rate of seventy-two dollars per month from the date of the passage of this act" was clearly not intended to be taken literally and without regard to other provisions of the pension laws; otherwise this pensioner would be entitled to receive the aforesaid rate from March 4, 1890, nine years before his disability was incurred. Plainly, the provision of the act as to the commencement of the \$72 rate must be regarded as subject to the general provision of law that an original pension shall commence from the date of filing the application therefor.

The words "shall be entitled to receive a pension at the rate of seventy-two dollars per month from the date of the passage of this act," etc., were, in effect, a declaration that from and after that date the rate of pension for total and permanent helplessness requiring the regular aid and attendance of another person should be \$72 per month. In the cases of those who were then pensioned or entitled to be pensioned for such degree of disability, the effect was to authorize the allowance to them of \$72 per month to commence from the date of the passage of the act. In the cases of those who were then pensioned, or entitled to be pensioned, for some lesser degree of disability which thereafter increased so as to render them so totally and permanently helpless as to require the regular personal aid and attendance of another person, the effect was to authorize the allowance of the \$72 rate to commence from the date of the medical examination establishing such degree of disability. Where the right to pension arose subsequent to the passage of the act, and the requisite degree of disability existed at the time of filing the application, the logical effect would seem to be that the commencement of pension and the commencement of the \$72 rate should coincide in point of time.

It is quite certain that Congress did not intend that the act of March 4, 1890, should have the effect to diminish the rate of pension to which any pensioner would have been otherwise entitled, yet that is precisely the effect that is given to it by the construction adopted by the Bureau. If the act referred to had never been passed the appellant would have been entitled to \$50 per month, from the date of his application, under the provisions of the act of June 18, 1874. The Bureau has granted him but \$30 per month, for the reason that the act of March 4, 1890, is held to have abolished the rate of \$50 provided by the act of June 18, 1874, for total and permanent helplessness requiring the regular personal aid and attendance of another person. The manifest intent of the act of March 4, 1890, was to extend the benefits of the act of June 16, 1880 (which increased the pensions of those who were then receiving \$50 per month under the act of June 18, 1874, to \$72), to those who were not at that time receiving \$50, but who were then, or subsequently became, entitled to that rate. In carrying out that intent it is simply necessary to substitute \$72 for \$50, for any period subsequent to March 4, 1890, during which a pensioner would, under the provisions of the act of June 18, 1874, have been entitled to the latter rate. This requires no violence to the language of the act when it is read, as it should be, in connection with other acts in *pari materia*. A construction which has the effect of reducing instead of increasing the pension of one of this unfortunate class of pensioners for any time whatsoever is so at variance with the general policy of Congress as to make its adoption unjustifiable where the language will admit of any other interpretation.

For reasons above stated the action of the Bureau, from which the appeal is taken, is reversed, and you are instructed to allow pension at the rate of \$72 per month from the date of filing of the appellant's application.

MARRIAGE—PENNSYLVANIA—IMPEDIMENT—EVIDENCE.

ANNIE E. LARAWAY (AS WIDOW).

At the time of the marriage of claimant to soldier said soldier had a wife living from whom he had not been divorced. Said marriage was therefore void and cohabitation thereunder illicit. Marriage will not be presumed from cohabitation, when the relation between the parties was of illicit origin, in the absence of proof of a subsequent actual marriage.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions.
October 26, 1903.*

This appellant, Annie E. Laraway, on July 28, 1890, filed a claim, No. 445479, for pension under the act of June 27, 1890, as widow of Gilbert Laraway, who was a member of Company C, Seventeenth Vermont Infantry, from January 20, 1864, to July 14, 1865, and who died October 28, 1889.

Her claim was rejected in January, 1901, on the ground that she is not the soldier's widow, he having at the time of their marriage a former wife living and undivorced.

In this appeal she contends that the evidence establishes a valid common-law marriage between her and soldier after the death of his first wife in 1879.

This contention can not be sustained. The formal marriage between claimant and soldier in 1878 in the State of Pennsylvania was unquestionably, and is admitted to have been, void because of his former marriage in 1866 to Eliza Brown, whom he deserted a few years later and from whom he was never divorced; and there is no evidence of any new marriage contract between soldier and claimant after June 14, 1879, the date of the death of his first wife.

In Pennsylvania a void marriage entered into by a man whose wife is living is not ratified and thereby rendered valid by reason of the fact that cohabitation by virtue of it continues after the death of the man's former wife. (See King's Estate, 9 Kulp, 54.) And in order to establish a valid subsequent marriage after the removal of the impediment the parties must be shown to have thereafter not only cohabited and been reputed as husband and wife, but repeatedly, continuously, and openly acknowledged and declared themselves as such, lived in a manner inconsistent with the existence of any other relation, and recognized and treated their children as legitimate. (See Physick's Estate, 2 Brewst., 179; Brice's Estate, 2 W. N. C., 112; Staiger's Estate, 7 D. R., 351; Bergdall's Estate, *ibid.*, 137.)

The court in the case last cited says:

The cases agree that the character of a relation whose origin is shown to be illicit will remain unchanged until a new and legal contract shall be ratified; they differ as to the measure of proof which will be required to establish the contract. Cohabitation alone or cohabitation with repute of marriage will not be sufficient, because both of these elements of proof may coincide with an unlawful association. The cases diverge at the point where, in addition to cohabitation and repute, the acts of the parties are held to furnish the evidence from which the new status may be implied. Their mutual admissions, their recognition of offspring, their joinder in deeds, their testamentary provision for each other, have all been held to be vouchers, more or less decisive, that they had accepted the duties and responsibilities of marriage.

And also in *Hunt v. Cleveland* (6 Pa. C. C., 592) the court stated:

Marriage, therefore, will not be presumed from cohabitation, when the relation between the parties was of illicit origin, in the absence of proof of a subsequent actual marriage.

(See *Sarah C. Hayden*, 8 P. D., 364; *Rebecca C. Howell*, 12 P. D., 300.)

As stated, there is no evidence in this case of any new actual marriage after the death of the soldier's first wife. Claimant says she did not know of any prior marriage on his part until ten years after his death. She being ignorant during his life of the invalidity of their marriage, could not have, in fact, consented to any new contract of marriage. There can, therefore, be no presumption of what was impossible in fact, and the claimant's innocence or ignorance as to the impediment does not change the application of the rule. (See *Hunt's Appeal*, 86 Pa. St., 294.)

The evidence herein fails to show a valid marriage between claimant and soldier under the laws of the State where they resided, and she can not be considered as his widow.

Rejection of claim is affirmed.

LINE OF DUTY—IN ARREST AWAITING TRIAL—DEATH.

SARAH PHILLIPS, NOW CLARK (WIDOW).

A disease contracted by soldier while in confinement awaiting trial for a breach of military duty is not necessarily incurred without the line of duty, and when the soldier is acquitted, or died while awaiting trial, a disease so contracted is held to have been incurred in line of duty.

Assistant Secretary M. W. Miller to the Commissioner of Pensions,
October 26, 1903.

This is the appeal of Sarah Clark, formerly Phillips, filed June 25, 1902, from the refusal of the Bureau to restore her name to the pension rolls under the provisions of the act of March 3, 1901, certificate No. 409516.

It appears that this claimant was married to one Abraham V. Phillips in December, 1861, and that her husband died of chronic diarrhea January 29, 1865, while serving under the name of Alexander Peterson as a private in Company K, Fifty-second Pennsylvania Volunteer Infantry. April 17, 1891, she applied for a pension under the general law, and on April 13, 1895, her claim was admitted and she was pensioned from the date of the death of her soldier husband to the date of her marriage to one Clark, on July 4, 1869.

October 26, 1901, claimant's second husband died. December 3, 1901, she applied for restoration, and on April 28, 1902, her claim was rejected, as follows:

Approved for rejection on the ground that death was not in line of duty, as the records of the War Department now show the soldier was at the time under arrest awaiting trial for breach of military duty, and there is no evidence in case that his fatal disability, chronic diarrhea, was contracted prior to date of being placed under arrest, September 22, 1864, and claimant has declared her inability to furnish such evidence.

A report of the War Department, dated March 1, 1902, states the following:

It appears from the records that * * * Alexander Peterson, Company K, Fifty-second Pennsylvania Infantry, is shown to have been in arrest and awaiting trial for a breach of military discipline from September 22, 1864, to the date of his death. Cause of death, chronic diarrhea.

The records also show that he died in a hospital at Morris Island, South Carolina, after treatment for chronic diarrhea from October 8, 1864, to his death, January 29, 1865.

From the records it does not appear with what offense the soldier was accused, but it does appear that he was never tried; therefore, in the eyes of the law and of the Department it must be and is presumed that he was innocent, no competent authority having pronounced him guilty. The Department, in the case of Caroline Chollar (4 P. D., 103), in discussing the effect of a verdict upon the status of a prisoner, said:

It is not to be denied, however, that if, upon investigation, the soldier had been found innocent instead of guilty of the charges upon which he was arrested and imprisoned, the imprisonment would not have put him out of the line of duty; but the conviction of the soldier by the tribunal before which he was tried made the charges good, justified the arrest and imprisonment, and therefore placed him outside the line of duty for pension on account of any disability contracted by him while thus held in duress.

From this it would appear that where an innocent party is in confinement awaiting trial any disability then contracted would be considered as one contracted in line of duty; and there is justice and equity in such a holding. To say otherwise would be to take without the line of duty and expose to additional hazards any soldier, who, through no fault of his own, was accused of some breach of military discipline or of the Army Regulations. The very essence of the long line of

decisions holding that a soldier is not in line of duty when undergoing punishment is the fact that he, by his own disobedient act, knowingly and willfully placed himself without the line of duty; and when this is not the fact, in submitting to arrest and confinement awaiting trial, he is merely obeying his superior officers, thus doing his duty as a soldier.

As it must be presumed that the soldier was innocent of the offense of which he was accused, it matters not whether the chronic diarrhea was contracted prior or subsequent to his arrest; in either case, as it is presumed, in view of the evidence in this case, that he was sound at enlistment, the disease was incurred in line of duty.

As a matter of fact, the evidence does not show that the soldier was actually in confinement; on the contrary, George W. Evans (dep., Oct. 12, 1894), a member of a New York regiment, testified that the soldier was at liberty after the date of the arrest, and visited the witness in his tent.

The evidence does not definitely show when and where the chronic diarrhea was contracted; but the Bureau once accepted it as of service origin, and this being true, in this application it can not be denied unless it satisfactorily appears that the evidence upon which the former adjudication was based was fraudulent, or it is now affirmatively shown that it was not contracted during the soldier's service and in line of duty.

The action complained of is reversed

RE-RATING—ACTS OF AUGUST 4, 1886, AND MARCH 2, 1903—PRACTICE.

JOHN W. SMITH.

The claimant received the highest possible rating for his disability prior to June 6, 1886, and he was not entitled to a higher rating than he was receiving from August 4, 1886. A re-rating was therefore not warranted.

The present rating, \$30 per month, was shown by the report of the last official examination to be adequate for the pensioned disability, gunshot wound of right thigh.

The action advising the claimant that he is not entitled to the benefit of the act of March 2, 1903, as alleged, was error. He should have been afforded an opportunity to show that he was disabled in an increased degree, irrespective of said act. Final action should be taken on a face brief.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, October 30, 1903.

John W. Smith, formerly a private in Company G, Twenty-fifth Ohio Volunteer Infantry, is now a pensioner at the second-grade rate (\$30 per month) on account of a gunshot wound of his right thigh. He has received this rate since April 9, 1890. The rates prior to that date were as follows: Total (\$8 per month) from discharge, September

14, 1863, to June 6, 1866, and third grade thereafter; this includes the rates of \$15, \$18, and \$24, which were successively established from time to time according to acts of Congress.

A claim for further increase of pension was filed June 18, 1900, and on January 5, 1901, a claim for rerating was also filed. In this claim the pensioner asserted that he was entitled to "the rate of \$12 extant prior to June 6, 1866," and to \$36 per month since August 4, 1886, instead of the rates he has received during these periods. These claims were rejected February 3, 1902, on the ground that there was no increase in the degree of disability and "no medical grounds for rerating."

An appeal to the Department from said action was filed July 5, 1902, the claimant merely asserting that the action was not warranted by the facts.

Pending the consideration of this appeal the pensioner filed a declaration in the Pension Office, March 18, 1903, alleging that he was entitled to further increase under the provisions of the act of Congress, approved March 2, 1903. Under date of April 25, 1903, it appears he was informed that he was not entitled to the benefits of said act.

On May 2, 1903, the pensioner filed another appeal to the Department contending that he is entitled to increase under this recent act, because his leg "is disabled in a degree equivalent to loss of foot, as once rated."

The appeals will be considered in the order in which they were filed.

The claimant has evidently been misinformed in regard to the alleged "rate of \$12 extant prior to June 6, 1866," for there never was such a rate. Prior to June 6, 1866, specific rates were only provided for the loss of sight of both eyes (\$25), the loss of both hands (\$25), or both feet (\$20), or the loss of one hand and one foot (\$20), and the rates for all other disabilities could not exceed the "total" of the soldier's rank, which, in the case of a private, is \$8 per month—the amount this claimant actually received during the period in question. The act of June 6, 1866, established specific rates for certain disabilities in addition to those mentioned above and also established the grade rates. As already shown, the claimant was allowed the third-grade rate from June 6, 1866, and the second-grade rate (which he now receives) from May 22, 1890. Having received the highest possible rate prior to June 6, 1866, the claimant could not be allowed a rerating over that period.

The claimant further alleged in the claim first in contention that he is entitled to \$36 per month from August 4, 1886, obviously meaning that the wounded leg has been totally disabled, for the act of that date established this rate for such degree of disability and increased the rates for other affections. It appears that, without any application on the part of the claimant after the passage of this act, he was med-

ically examined November 3, 1886, for the express purpose of determining whether or not he was entitled to increase under the provisions thereof. The report of this examination showed that, although the knee of the injured limb was ankylosed in a straight position he could use the limb in walking and standing, clearly demonstrating that it was not totally disabled and that he was not entitled to increase of pension under said act.

The increase to second grade was subsequently duly allowed, under an application for increase, from the date of the certificate of examination showing that there was considerable suppuration in the affected limb and that the claimant was wholly incapacitated for the performance of manual labor.

In connection with the claim for increase filed in 1900, there was filed May 15, 1901, the affidavit of Dr. C. A. Henry, in which he stated that he had carefully examined the claimant; that in his opinion, on account of the gunshot wound of the right thigh, there was total disability of the right leg; that if the leg was amputated and an artificial limb substituted the claimant would be much better off, etc.

The official medical examination under this claim was made June 19, 1901, and Doctor Henry was a member of the board of examining surgeons. The report shows that the claimant was then 57 years of age, and a hotel keeper by occupation. The objective conditions are described as follows:

Gunshot wound, right leg; cicatrix of entrance on anterior surface of thigh, 5 $\frac{1}{4}$ inches above knee; cicatrix 1 $\frac{1}{4}$ inches in diameter, depressed three-fourths inch and adherent to femur. Ball passed upward and backward, making its exit on posterior surface of thigh. Ball passed through femur; complete fracture (compound). Cicatrix of exit 2 inches long by 1 inch wide, depressed, tender, and adherent to femur. From point of fracture down to knee are numerous cicatrices, the results of suppuration. Suppuration has resulted in traumatic synovitis, with complete ankylosis. The toes of right foot are turned inward, the result of fracture, angle of 30 degrees. When walking, drags toes. Muscles of thigh are adherent, resulting in almost complete loss of same. Measurements: middle of middle one-third of thigh, right, 15 inches; left, 16 $\frac{1}{4}$; at junction of middle and upper one-third of leg, right, 12 $\frac{1}{2}$; left, 11 $\frac{1}{2}$. Superficial veins of right leg are varicose, thereby causing difference of measurements below knee. Right leg 1 $\frac{1}{2}$ inches shorter than left. Cicatrices frequently gather and break, and at such times there are pieces of carious bone. At such times uses crutches. Seventeen-eighteenths.

Rheumatism: muscular exhaustion of left leg from overuse. Claimant has attributed his muscular exhaustion to rheumatism. No evidence of rheumatism.

Except as above stated all other organs normal. No evidence of vicious habits.

This claimant is so disabled from gunshot-wound right leg as to be incapacitated for any manual labor, and is entitled to \$30 a month.

This report clearly indicates that the claimant's right leg was quite useful—that it was far from being totally disabled. The claimant apparently uses or requires crutches only at such times as the leg is inflamed and suppurating, of which there is no recent evidence. An increased rating was certainly not warranted under said claim.

The action referred to in the first appeal is affirmed.

In the second appeal, and also in filing the claim referred to, the claimant was evidently under a misapprehension as to the provisions of the recent act of Congress to increase the pensions of certain persons. This act did not provide for any increase in the rate of pension for disabilities "equivalent to the loss of a hand or foot," the third grade, which this claimant formerly received, nor does it provide for an increase of the second grade rate. The act of March 2, 1903, provides as follows:

That from and after the passage of this act all persons on the pension roll, and all persons hereafter granted a pension, who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand or one foot, or been totally disabled in the same, shall receive a pension at the rate of forty dollars per month; that all persons who, in like manner, shall have lost an arm at or above the elbow, or a leg at or above the knee, or been totally disabled in the same, shall receive a pension at the rate of forty-six dollars per month; that all persons who, in like manner, shall have lost an arm at the shoulder joint or a leg at the hip joint, or so near the shoulder or hip joint or where the same is in such a condition as to prevent the use of an artificial limb, shall receive a pension at the rate of fifty-five dollars per month, and that all persons who, in like manner, shall have lost one hand and one foot, or been totally disabled in the same, shall receive a pension at the rate of sixty dollars per month; and that all persons who, in like manner, shall have lost both feet shall receive a pension at the rate of one hundred dollars per month: *Provided, however,* That this act shall not be so construed as to reduce any pension under any act, public or private.

It is obvious, therefore, that this claimant can not be entitled to a higher rate of pension under existing laws unless the gunshot wound of his thigh causes total disability of the foot or leg, or causes some other greater degree of disability.

A question arises, however, in regard to the manner in which this claim was disposed of. The claimant alleged that by reason of the extent of disability arising from said wound he believes himself entitled to increase of pension under the provisions of said act. No evidence was called for, no medical examination was made, and no formal action was taken upon a face brief. The claimant was merely advised that he is not entitled to the benefits of said act "for the reason that a total disability from pensioned cause, gunshot wound of right thigh, is not shown to exist." This conclusion appears to have been based upon the evidence and the report of the medical examination, cited above, under the other claim filed nearly two years prior to the passage of said act.

The claimant was not afforded an opportunity to show that he was disabled as alleged. Perhaps, or even most probably, he was not so disabled and could not have shown *prima facie* that he was entitled to the benefit of said act. But that is not the question. The claimant should have been informed that this act does not apply to pensioners at the second or third grade rates, and that although the evidence on

file does not indicate that he is entitled to a higher rate under any law, he is at liberty to file a formal claim for increase together with evidence showing his physical condition if he has any reason to believe his disability has increased. Indeed, the declaration might readily have been considered as a claim for increase of pension irrespective of said act, for it is wholly unnecessary for any pensioner to file a claim for the benefits thereof.

In this view of the case the Department finds that the action upon this claim was error, and the same is remanded for further appropriate action.

ADULTEROUS COHABITATION—SPECIAL EXAMINER'S CONDUCT.

ANNIE SNYDER (WIDOW).

The only evidence of open and notorious adulterous cohabitation by claimant is her reported confessions to a special examiner, which she swears she never made, but that said special examiner falsely put the same in her statement and did not read that part of it to her.

The evidence taken on a second examination shows claimant to be an upright, moral, and chaste woman, and no person could be found who had even a suspicion that she had committed an immoral act.

*Assistant Secretary W. M. Miller to the Commissioner of Pensions,
October 30, 1903.*

February 20, 1903, the Department, on appeal, affirmed the action of the Bureau of March 17, 1900, dropping from the pension rolls the name of Annie, widow of Edwin P. Snyder, seaman, ships *Penguin*, *Dale*, and *North Carolina*, United States Navy.

It appears that the widow had been pensioned under the act of June 27, 1890, from May 4, 1892.

Her pension was terminated on the report of a special examiner. His report was accompanied by an alleged sworn statement made by the claimant to the examiner to the effect that she had frequently violated the provision of the act of August 7, 1882, since the death of her husband, April 16, 1892. The action dropping her name from the rolls was taken solely on her alleged admission of guilt, and these admissions were fully set forth by the Department in its action.

March 27, 1903, the attorney filed a motion for reconsideration, calling attention to claimant's sworn statement in record when the case was here on appeal, positively denying that she admitted to the examiner or anyone else that she was guilty of the alleged immorality, and also positively denying that she had been guilty of any immoral conduct.

It is insisted in the motion that the examiner used fraudulent and disreputable means to secure the alleged admission, and reference is

made to the case of Frances Coleman, widow of Henry Coleman, Company E, Seventh U. S. Colored Volunteer Infantry, decided by the Department January 30, 1903, press-copy book 559, page 457, to sustain claimant's contention that the examiner employed improper and disreputable methods to secure admission of immoral conduct on the part of widows whose claims were under investigation.

The Department considered this motion, April 13, 1903, in which the following statements were made:

It is shown in the Coleman case that the examiner went far beyond the requirements of duty and that his conduct was indecent and outrageous toward the claimant. The Department disregarded his report, showing plain admission of guilt, and on other testimony in the case directed that Mrs. Coleman's name be restored to the rolls. Practically the same charges are made against the examiner in this case.

His report can not be received as worthy of credit, at least it can not be accepted to injure the reputation of one whose character is shown by other witnesses to be good. In the light of the disclosures made in the Coleman case, his report in this case is not worthy of credence.

It is not the province of the examiner to seek to entrap or to discredit any claimant. His duty is to assist in obtaining the facts in any case without espousing the cause either of the claimant or the Government. He must be fair, impartial, and diligent to obtain the truth, irrespective of whom it benefits or injures. The examiner is not an attorney for the Government, employed to defeat claimant's contention. He is rather the friend of both, empowered to discover the actual facts in a case and to report them to the proper authorities without favor or prejudice.

The Department set aside and revoked its action of February 20, 1903, and directed that the claim be reopened and referred to some other examiner for investigation. It was directed that another statement be taken from claimant and the witnesses to her deposition.

The claim was specially examined in June and July, 1903, and again considered by the Bureau September 25, 1903. The claim was again rejected on the ground that:

The claimant's conduct since the death of soldier and since the passage of the act of August 7, 1882, has been in violation of said act and she has forfeited her title to pension as widow of soldier.

All the witnesses whose depositions were taken under the last special examination are reported as of good reputation, the examiner stating that claimant's reputation is "good."

It is shown that soldier died in Joliet prison hospital, April 16, 1892. Claimant was then residing in Chicago, Ill., and has continued to reside at that place. For some years after his death she was employed as a seamstress by various persons. She has only one child, a son, Charles M. Snyder, age 33 years, who resided with her until he was married. She lived thereafter by herself in rented rooms in the city until about the summer of 1894, when she engaged herself as housekeeper for one Samuel Avery. She kept house for him up to the spring of 1898, when she again moved to begin housekeeping for herself.

It appears that Mr. Avery rented a flat containing four rooms, it being the second story, and a family named Alday occupied the first story of the same building. When she commenced keeping house for Mr. Avery the latter had a son and daughter who lived with him, the son afterwards becoming married and living to himself, and the daughter being employed as a domestic for some family in the city, but returning from time to time to her father's domicile. It appears that the claimant is a hard-working woman. She became acquainted with Avery from having done his washing and cleaning up his house. Avery applied to her to keep house for him, agreeing to give her her board and room for the work, but paying no other wages. She continued to do sewing, and the proceeds, together with her pension, were sufficient for her clothing. There were two bedrooms in the little flat, a parlor and a kitchen, and Avery occupied one room and claimant the other, the daughter sleeping with claimant when not in service as a domestic. She testified that she always went by the name of Snyder, and positively denied that she ever lived with Avery as his wife, or that she had any improper relations with him. She stated that the former examiner tried to get her to admit that she had been sexually intimate with Mr. Avery, but that she denied it, swearing positively that she was never guilty of any such conduct with him. She stated that she read the deposition the best she could, but she saw nothing in it that represented her as admitting sexual intimacy with Mr. Avery. She further stated that Nora Morgan and Winnifred Murphy were called in after the examiner had written up the paper.

On being shown her signature to her former deposition she admitted signing the same, but on hearing the same again read she stated that if the matters contained in the deposition were there when she signed it she did not understand what she was signing. She referred to the former examiner as employing the word "affairs," and stated that he asked her:

Didn't you have affairs with that man?

She further stated that when she understood what he meant that she positively denied having any such "affair." She then represented the former examiner as saying:

You can not make me believe that a nice-looking woman like you would not have that. My, but you are a fine-looking woman! When he said this he tapped me on the shoulder. His tone and manner and actions were very insulting.

Winnifred Agnes Murphy, who was one of the witnesses to the former deposition, was interviewed by the examiner June 29, 1903. She testified that she recollected having been called upon by Mrs. Snyder to go to her room and sign her name to a paper; that Nora Morgan was with her; that there was a man there and he had a paper, all written up, and told her and Nora Morgan to sign their name to

it; that she did not know what the paper was about; that it was not read in her hearing; that she saw Mrs. Snyder, the claimant, sign her name to it; that she did not see her read it and did not know whether she knew what was in it or not; that she was not sworn, no form of oath being administered. She further stated that she never knew the contents of the deposition of Mrs. Snyder which she witnessed, and that Mrs. Snyder did not acknowledge in her presence that she knew what was written in the paper.

She further stated that Mrs. Snyder is a woman of good character; that she never heard anyone say anything against her character. She further stated that Miss Morgan, the other witness to the deposition, had left the city, and that she did not know her present whereabouts; that all Miss Morgan was cognizant of is given by her in her deposition.

Samuel Avery, the alleged paramour of claimant, reputation good, testified substantially that he employed Mrs. Snyder, the claimant, as housekeeper in 1894, and that she continued in that capacity until about 1898. He stated that his wife died about twelve years ago (1891). He corroborated claimant in all respects as to their arrangement for keeping house. He stated that claimant was never known as Mrs. Avery; that she was a woman of good moral character and that the statement that he had ever lived in adultery with her at any time, was false. After hearing claimant's deposition, taken before the first special examiner, read, Mr. Avery said:

I say that it is absolutely untrue where it represents us as having been sexually intimate. I am at a loss to understand how Mrs. Snyder ever could have signed her name to such a statement, and I am satisfied she could not have understood what she was signing.

Lydia Duffy, daughter of Samuel Avery, the former witness, testified before the examiner, describing the same arrangements for keeping house as given by Mrs. Snyder. She figured that she was there quite a good part of the time and knew that her father and claimant did not live together as man and wife and did not sustain immoral relations. She stated that she always believed and still believed that Mrs. Snyder, the claimant, was a woman of good moral character. She stated that claimant was of a nervous disposition and easily excited, and she felt confident that she did not understand the deposition wherein admissions were made of improper relations with her father.

Louisa Kouder, reputation good, aged 47, stated that she was well acquainted with claimant and knew her when she kept house for Mr. Avery, stating that claimant was of good moral character; that she occasionally visited her.

To the same effect is the testimony of Kate McHugh and T. E. Johns and Jennie Jacobson.

August Alday and his wife, Josephene, testified before the examiner September 14, 1903. The testimony of these witnesses is to the effect that they lived in the same building, immediately beneath the flat occupied by claimant and Mr. Avery; that they never heard any intimation that Avery and the claimant sustained immoral relations.

Other witnesses testified in the case and all the testimony taken on the recent special examination is to the effect that claimant sustains a good reputation for chastity. There is no testimony whatever to show that she is a woman of bad character, except that contained in her deposition taken before the first special examiner, wherein she is represented as admitting sexual intercourse with Mr. Avery.

As shown above, the Department has already held that the first examiner's report is not worthy of credit.

The act of August 7, 1882, provides that:

The open and notorious cohabitation of a widow who is a pensioner shall operate to terminate her pension from the commencement of such cohabitation.

There is no evidence showing that claimant herein has been guilty of violating said act, except her alleged confession made to the examiner, January 3, 1900.

As shown considerable testimony was taken on the recent special examination in 1903. The witnesses, all of good reputation, testified that she bore a good name for chastity.

From the testimony now in the record it must be held that the first examiner went far beyond the limits of duty. Indeed, if claimant correctly represented him, his conduct was most disreputable. He stated in his report that the two witnesses to the alleged confession were present and that claimant acknowledged in their presence that she knew the contents of the deposition and acknowledged the same to be true. Only one witness, Winnifred Agnes Murphy, could be found and she positively denied the examiner's statement.

It is scarcely probable that claimant made the statement attributed to her. Her friends and associates were excellent people. She knew she bore a good reputation, and to accept the examiner's statement that she voluntarily cast odium on her good name, thus furnishing the evidence to take away her pension, the principal means of her support, goes beyond the bounds of reasonable probability. In other words, the Department is of opinion, as formerly expressed, that the examiner, in his eagerness to make a record, gratuitously and falsely cast upon claimant the odium of living a disreputable life. In doing this he placed himself in a position far below that in which he attempted to place the claimant. His conduct was both inhuman and infamous, and it is well that he has been separated from the service, since such conduct can only bring the service into disrepute.

In this connection it is proper to say that the Department intends

to cast no reflection upon examiners in general, who as a rule are very careful and prudent in their actions and very fair in their treatment of cases assigned to them.

There is no testimony in the record of any improper conduct on claimant's part other than the alleged confession herein disposed of.

Claimant's name will be restored to the pension rolls, and it is so ordered.

The motion is hereby sustained.

NAVY PENSIONS—SECTION 4757, REVISED STATUTES—REIMBURSEMENT.

JAMES R. BELL.

The Commissioner of Pensions has no lawful power to direct recovery, from a subsequent allowance certified to him by the Secretary of the Navy under section 4757 of the Revised Statutes, of any part of a similar allowance previously certified to him by said Secretary of the Navy and already paid by him, notwithstanding the Secretary of the Navy has, since the final payment of said first allowance, certified that he has reduced it and requested payment at the reduced rate; but where the Secretary of the Navy makes such certificate and request, as to a reduction of the rate, before action by the Commissioner of Pensions upon the first certificate authorizing payment at the rate from which reduced, the Commissioner should follow the later certificate and request, and should pay only the reduced rate.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
September 28, 1903.*

This appellant, James R. Bell, formerly of the United States Marine Corps, on December 13, 1900, filed a claim under the Revised Statutes for pension on account of rheumatism, lumbago, and iritis, which was allowed in March, 1902, as to the two former, and rejected as to the latter, the disability being rated at four-eighteenths, subject to the benefit of the act of March 2, 1895 (providing that the minimum rate of pension shall be \$6 per month).

Prior to this allowance, to wit, on January 29, 1901, certificate No. 29910 was issued to appellant, allowing him, upon the certification of the Secretary of the Navy, as authorized by section 4757 of said Revised Statutes, \$6 per month, "aid from the surplus income of the naval pension fund," for one year from June 23, 1900, and he was paid this accordingly to June 23, 1901.

On August 28, 1901, the Secretary of the Navy certified to the Commissioner of Pensions, in accordance with said section 4757, a further allowance to appellant of such aid at the rate of \$8 per month for two years (from July 10, 1901).

In view of the allowance of appellant's claim for pension covering these periods of payment of said aid, the Secretary of the Navy on December 5, 1901, and February 11, 1902, requested the Commissioner

of Pensions, "conformably with the requirements of said section 4757, * * * to reduce the rates of said aid from \$6 and \$8 per month, respectively, to \$1.50 per month."

The Commissioner of Pensions thereupon reissued certificate, "in lieu of" that dated January 29, 1901, and allowed thereby \$7.50 per month from December 13, 1900, date of filing said claim for pension, \$6 per month from June 23, 1901, date of termination of the first allowance of aid above mentioned, and \$8 per month from July 10, 1901, date of commencement of the second allowance of said aid, the pension terminating July 9, 1901.

The Commissioner of Pensions further ordered, in said reissued certificate, that \$4.50 per month, as an overpayment of said aid from December 13, 1900, to June 23, 1901, should be recovered from this allowance.

On August 21, 1902, the claimant appealed, contending that a higher rate of pension should be allowed under said claim for pension, and that pension thereunder was not allowed from date of filing of said claim.

This latter contention is in error. Pension herein was properly allowed from date of filing of the claim, and there is no ground for complaint on that score. This misconception of the pensioner was probably due to the withholding of payments covering the period of the first allowance to him of the naval pension fund aid, which will be hereinafter considered.

As to the question of rating of his pension, appellant was medically examined, first, in April, 1901, when no higher rating than that allowed him was recommended by the examining surgeons, the symptoms of disability being slight, and again in December, 1901, when he was examined only as to the alleged disability from iritis. The only symptoms of rheumatism and lumbago shown on the first examination were soreness and crepitation in knee joints, and soreness and slight stiffness in lumbar muscles, with inability to touch the floor within 12 inches with the hands on stooping.

It is manifest that the rate of pension allowed in this case was fully adequate for the disability from the accepted causes shown to exist, and the rating of pension is affirmed.

The recovery of the sum of \$4.50 per month to June 23, 1901, can not, however, be sustained. There is no warrant of law for any such recovery by the Commissioner of Pensions of money paid by him under section 4757 of the Revised Statutes upon certification by the Secretary of the Navy, or for the Commissioner of Pensions assuming any jurisdiction whatever over the subject-matter of such moneys, except, as held in the case of Elizabeth Sousa (12 P. D., 166), to act ministerially in paying whatever sum or sums the Secretary of the Navy may certify to him as authorized by that section. The latter

having certified to the allowance of \$6 per month for one year, the power of the Commissioner of Pensions over the payment thereof ended with that year, unless, perhaps, sooner terminated by the Secretary of the Navy, if he had power to terminate it sooner, which would be for him alone to determine.

The Commissioner of Pensions having paid, as directed by said section 4757, the entire sum thus certified to him by the Secretary of the Navy as allowed by the latter under that section, the power of the Commissioner of Pensions as regards that allowance ended absolutely under the law, and he could not be made the agent of the Secretary of the Navy for the purpose of making such recovery.

It is true said section 4757 provides that "no allowance so made shall, * * * if in addition to a pension, exceed one-fourth the rate of such pension."

But this is a provision which relates solely to the Secretary of the Navy, the one who alone has any jurisdiction over the subject-matter of the allowance. Whether he might thus reduce the rate of aid already paid and recover from a future allowance the excess so paid is for him alone to decide. The sole power of the Commissioner of Pensions in the premises is to pay what sum or sums the Secretary of the Navy may certify under said section. The Commissioner's powers are prospective, only, and ministerial, and relate solely to future payments after receipt of the certificate of authorization therefor from the Secretary of the Navy.

The responsibility for an excess or improper allowance, and for recovery of the same when paid, is the latter's solely—the Commissioner of Pensions may do no more than pay what the Secretary of the Navy certifies has been allowed.

The direction that the sum of \$4.50 per month from December 13, 1900, to June 23, 1901, be deducted and recovered from the allowance of pension and aid herein is, therefore, set aside and the action reversed to that extent, and you will pay appellant the sum so withheld accordingly.

The Commissioner of Pensions had also no legal warrant for disregarding the certification and request of the Secretary of the Navy of February 11, 1902, as to the second allowance by the latter under said section 4757. The Secretary of the Navy then requested the Commissioner to reduce said allowance to \$1.50 per month. This was in effect an abrogation of his prior certificate to the Commissioner, authorizing the latter to pay \$8 per month, and should have been given effect as regards any payment of such fund made by the Commissioner subsequently to receipt by him of said letter of February 11, 1902.

The certificate of the Secretary of the Navy of August 28, 1901, authorizing the Commissioner of Pensions to pay appellant \$8 per month from July 10, 1901, for two years, had not yet been acted upon

by the Commissioner at the date of allowance by him of appellant's claim for pension, and he properly called upon the Secretary of the Navy to reduce such aid to conform to said section 4757, and the latter having reduced it accordingly, the Commissioner should have issued certificate in accordance with the Secretary's later certificate as to such allowance, and continued appellant upon the pension roll as a pensioner and not as a beneficiary of the surplus naval pension fund under said section 4757.

The relative powers of the Commissioner of Pensions and the Secretary of the Navy as to allowances under said section are fully discussed and clearly stated in said decision in the case of Elizabeth Sousa, *supra*, and need not be further considered in this decision.

Certificate should reissue herein for the payment to appellant of \$6 per month from December 13, 1900, \$7.50 per month from July 10, 1901, and \$6 per month from July 10, 1903, payments made to be deducted, but the one year's naval aid ending June 23, 1901, not to be considered; and the Secretary of the Navy should be notified accordingly and of the purport of this decision, in order that he may take such action as he may think proper as to recovery from future allowances by him to appellant under said section 4757 of any excess amounts paid upon the prior allowances above mentioned.

An application for restoration of pension from July 9, 1903, was filed by appellant on July 10, 1903, but has not yet been adjudicated. On August 7, 1903, he filed an application also for renewal of aid under said section 4757, and on August 31, 1903, the Secretary of the Navy certified to a further allowance to appellant from said surplus naval pension fund, of \$8 per month for three years, this allowance being based, his certificate also states, upon appellant's statement that he no longer draws disability pension.

Whether appellant may waive his pension and receive instead such naval aid allowance is a question which need not now be decided by the Department, but it should be determined first by the Commissioner of Pensions. This decision aims only to correct the errors made in the certificate issued March 11, 1902, by directing a reissue which shall secure to appellant a refundment of all the naval aid paid him prior to the allowance of pension, and which may have been recovered from him under said issue of March 11, 1902, and by placing him upon the roll as a pensioner at \$6 per month from date of filing claim and as a beneficiary of said naval aid at \$1.50 per month for two years from July 10, 1901, his future status to be as the Commissioner of Pensions, primarily, may determine.

The action appealed from is reversed accordingly.

ATTORNEYS—RECOGNITION—NEGLECT.

ROBERT H. BALL (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

An attorney, in order to preserve his inchoate right to recognition, must render some service, at least call up the case at intervals of one year or less until he is formally recognized by the Bureau, or until the claim is allowed.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
October 31, 1903.*

Milo B. Stevens & Co., of Washington, D. C., on May 9, 1903, entered an appeal from the action of the Bureau denying them a fee on the issue of December 4, 1901, in the claim for pension under the act of June 27, 1890, of Robert H. Bell, who served in Companies G and B, Forty-seventh Illinois Volunteer Infantry.

August 10, 1892, James M. Graham, of Manhattan, Kans., in behalf of the soldier filed a declaration for pension under the act of June 27, 1890, which contained a power of attorney in his favor. The claim was rejected November 27, 1893.

April 4, 1898, the appellants, in behalf of the soldier, filed another declaration for pension under the act of June 27, 1890, which contained a power of attorney in their favor, and in which debility from age, rheumatism, neuralgia of the stomach, constipation, gunshot wound, and dislocation of the shoulder were alleged as disabling causes. They called up the case on April 5, 1899, September 26, 1900, and September 5, 1901. A medical examination was ordered through them March 31, 1900, and held May 2, 1900.

November 8, 1899, P. J. Lockwood, of Washington, D. C., filed a power of attorney from the claimant authorizing him to prosecute the case. He filed evidence December 28, 1899, and on January 16, 1901 filed a new declaration. He again filed evidence on March 15, 1900, and April 30, 1901, the last in response to a call of the Bureau of March 20, 1901. He also called up the case May 14, August 20, and October 1, 1901.

Certificate issued December 4, 1901, to allow pension in the claim from April 4, 1898, date of filing declaration by appellants. No fee was paid to them, hence this appeal.

The appellants filed no evidence whatever, but relied upon calls for status to preserve their inchoate right to recognition. The rule governing in this particular is that the attorney seeking thus to preserve his rights must call up the case at intervals of one year or less until recognized by the Bureau and given the status of the claim, or until the claim is allowed. Constructive recognition (that is, where the Bureau forwards through an attorney, or notifies him of the issue of an order for medical examination) serves the purpose of a call for

status. (William Coleman, 8 P. D., 450; Josiah C. Miller, 27 F. P. L. Bk., 382; Albert Durfey, Fee P. L. Bk., 29, 436; John C. Wallace, 33 Fee P. L. Bk., 13; Moses G. Jones, 39 Fee P. L. Bk., 251; James Murphey, 42 Fee P. L. Bk., 353.)

The appellants did nothing during the year which elapsed from the date on which they filed the declaration, viz, April 4, 1898, and, therefore, became in default on April 4, 1899. Subsequently to their default, and prior to the appearance of another attorney in the case, they filed calls for status. They submit that where under conditions which a call for status will operate to preserve an attorney's rights in a case, it also should operate to restore those rights when he becomes in neglect through failure to file a call for status within his allotted time, if filed before another attorney has appeared in the case. The question is not a new one. In the case of Peter J. Teberg (8 P. D., 224) it arose, was urged on appeal, and discussed at length. The Department held (syllabus) that—

After the lapse of one year without filing a call for status, the fact that one is then filed within less than a year prior to the appearance of another attorney in the case, and thereafter at intervals of one year, does not operate to give title to recognition to an attorney as against such other appearing subsequently in the claim.

The facts in the present case in all essential particulars are on all fours with those in the cited case. Nothing is submitted on this appeal which calls for further discussion.

The appellants, through their failure in the particular noted under rule 12, forfeited their inchoate right to recognition. As they subsequently rendered no material service in the claim prior to the appearance of another attorney therein, they were still in neglect when such other (Mr. Lockwood) filed a power of attorney authorizing him to continue the further prosecution of the case. Under the recited conditions there was no bar to his immediate recognition. The neglect of the appellants worked a forfeiture of their rights.

Where service has been rendered in a claim and an attorney seeks to profit by such service, and also by the service of other attorneys who appear in the claim subsequently to him, the rule under which he is permitted to do so, while easy to conform with, is technical and has been strictly enforced, as the cited cases show. His appointment may be followed by the appointment of another, as in this case, or other attorneys to prosecute the claim. All of such others may file evidence, and one of them be recognized by the Bureau and called upon for evidence, with which call he complied. Now it is apparent that, in justice to all, when one attorney seeks to profit by service rendered by others, he should be required to take some action at intervals of one year in conformity with the rule. It would not be fair to permit him to file a declaration and allow him to profit by the service of other attorneys without requiring him to do anything to preserve his

rights. It is true that he has rights, and these the rules protect and preserve if he conformed to them. The rules require that he take some action at intervals of one year or less—either file evidence or call for status, and such he can do; if he fails, he incurs the penalty of neglect.

The appellants were denied a fee upon the ground that under rule 12 they forfeited their rights by neglecting the case for more than one year, and while in neglect were superseded in the attorneyship. Action affirmed.

DIVISION OF PENSION—MARRIAGE—DIVORCE—JURISDICTION.

MORLEY v. MORLEY.

1. Pensioner having submitted the question of the validity of his marriage with claimant to a court of competent jurisdiction, he is bound by the final judicial determination thereof, no appeal having been taken therefrom.
2. The evidence in this case fairly establishes the facts necessary to prove claimant's title to one-half her husband's pension under the first proviso of the act of March 3, 1899, viz, that she is the lawful wife of pensioner; that he had deserted her for over six months immediately prior to the date on which she filed her application under said act; that she is a woman of good moral character and in necessitous circumstances.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
November 19, 1903.*

Claimant, who had been three times previously married, was married to pensioner, a widower, in Kent County, Mich., December 24, 1895. They cohabited as husband and wife from the date of their marriage until March 16, 1896, when pensioner abandoned claimant and has not since resumed marital relations with her or, in any manner, voluntarily contributed to her support.

Pensioner testified, in an affidavit July 21, 1902, that the reason why he left her was that he learned she had not been divorced from her first husband, to whom she was married in Indiana, nor from her last husband, one Miles Jarvis; that thereupon he left her and had not since lived with her.

Claimant testified, in an affidavit February 23, 1900, as follows:

That on the 24th day of December, A. D. 1853, she was married to one Ralph E. Cassel at Shelbyville, Ind., when she was but 14 years of age; that she lived with said Cassel but a short time when her father, Robert P. Babcock, took her away from the said Cassel, as she was married without his knowledge and consent; that said Ralph E. Cassel died on the 15th day of April, A. D. 1895; that this deponent was married to Oliver S. Miller on the 24th day of December, A. D. 1857, at Englishville, Kent County, Mich., and that the said Oliver S. Miller died on the 6th day of September, A. D. 1875; that on the 20th day of June, A. D. 1876, this deponent was married to Miles A. Jarvis, who, she supposed, was legally able to make a marriage contract, but it soon developed that the said Miles A. Jarvis had a living, undi-

forced wife, and this deponent immediately endeavored to take the necessary steps to free herself from the said Miles A. Jarvis; that said Jarvis, fearing a prosecution for the crime of bigamy, immediately left this deponent, community, and State, and this deponent has not seen or heard of him since; that being informed, and believing that her said marriage with the said Miles A. Jarvis was void ab initio, she did, on the 24th day of December, A. D. 1895, marry the pensioner, Jasper Morley, and is now his legal wife.

Voluminous testimony was filed by claimant and pensioner, after which the Bureau, on September 1, 1903, allowed the application of claimant, filed May 14, 1903, for one-half the pension of her husband, Jasper Morley, a pensioner under certificate No. 466699, at \$12 per month, on the ground that he had deserted claimant, his lawful wife, who was a person of good moral character and in necessitous circumstances.

From this action pensioner, by his attorney, W. D. Fuller, esq., appealed October 6, 1903, contending that—

First. Appellant never deserted the claimant within the meaning and intent of the act of March 3, 1899. It appears from the copies of the bill and answer in the case brought to annul his marriage to claimant and the accompanying affidavits that upon his marriage to claimant, December 24, 1895, he went to her home, he having none, to live, and because of a well-founded doubt as to the legality of said marriage, which claimant failed to remove by furnishing him proof of her divorce from a former husband, he left her home on March 16, 1896, and never returned to claimant. * * *

Second. Claimant was not at the time appellant left her, in March, 1896, nor has she since been, in necessitous circumstances; on the contrary, she was and is in far better financial condition than appellant, she being the owner of 7½ acres of land; that she conveyed to her daughter the north 3 acres of said land December 15, 1885, for an expressed consideration of \$1, reserving all the buildings on said land and conditioned that the grantee should not sell, convey, or lease, or give possession of said 3 acres to any other person during the life of claimant, and in case of a breach of said conditions the land was to revert to said claimant; that said 7½ acres of land is good farming land, all cleared, and has an orchard, dwelling house, and barn on the south 4½ acres not deeded to claimant's daughter; that claimant is living on said land with her said daughter and receives a good support; that she was offered \$500 for the land while appellant lived with her.

An appearance has been entered by and in behalf of claimant in said appeal, but no answer, brief, or argument filed by her.

It appears that pensioner filed his bill in the circuit court for the county of Kent, in chancery, State of Michigan, to annul and declare void his said marriage to claimant on the ground that at date of said marriage she had a husband living from whom she had not been divorced.

Claimant filed her answer thereto, denying the charges in said bill against her and alleging, among other defenses, a prior suit for divorce, filed by pensioner against her in said court, March 11, 1901, wherein the only charge was cruelty, and which bill was dismissed at the hearing, August 5, 1901, with costs, which have not been paid. She further alleged her necessitous circumstances and prayed for solicitor's fees, costs, and expenses.

The said suit to annul said marriage was tried on November 14, 1902, when the court rendered the following decree:

This cause having come on to be heard upon the bill of complaint of said complainant, praying for the annulment of the marriage between said parties, on the ground that said defendant was not legally capable of contracting said marriage, because of her previous marriage to one Miles A. Jarvis, yet living and undivorced, and the answer of defendant denying the material allegations of said bill, and the replication of said complainant to said answer, and upon the proofs of said parties taken both in open court and by depositions, from which it appears to this court that at the time when said defendant contracted said marriage with complainant she was an unmarried woman, lawfully empowered to enter said marriage relation with complainant, and has continued since then to be, and still is, his lawful wife:

It is therefore ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested and in accordance with the statutes in such cases made and provided, doth order, adjudge, and decree that the said marriage between said complainant, Jasper Morley, and the said defendant, Anna L. Jarvis (sometimes called Anna L. Morley), be affirmed, and the same is hereby affirmed, and that complainant's said bill of complaint be, and the same is hereby, dismissed for want of equity.

It is further ordered, adjudged, and decreed that said complainant, Jasper Morley, do pay to the register of this court \$25 as a solicitor's fee for defendant's solicitor herein within thirty days, and \$10 for defendant's other costs and expenses of this suit within sixty days hereof, the latter to be paid by said register to her.

WILLIS B. PERKINS, *Circuit Judge*.

This decree not only settled the rights of the parties as to their marriage status, but it is a determination of the law as a result of the facts and proceedings in a court of competent jurisdiction. It is also a final decree, no appeal having been taken therefrom, and estops the parties to deny the matrimonial status fixed and adjudged by the court, as the legal result of their marriage contract.

Marriage is a social, domestic status, founded upon contract and consummated and controlled by law. The parties to the marriage must be legally capable of contracting in order to constitute a marriage valid at the date of its consummation, and the court found in said decree that claimant was lawfully empowered to enter said marriage relation with pensioner, and that she was lawfully pensioner's wife. This was the question presented by the pleadings and it is not for this Department to say that the finding of the court was not authorized or justified by the evidence. Said decree became the law of the case so far as the domestic status of these parties is concerned.

As held by Cooley, J., in *Jacobson v. Miller* (41 Mich., 90-94), adjudications upon the subject-matter of a suit are conclusive whenever any question respecting it arises afterwards collaterally; and this is so whether the adjudication was obtained on default, or whether all possible questions were raised on the trial, or whether the adjudication was correct in fact and in law.

It was held by the Michigan supreme court in the case of *Dunlap v. Byers* (110 Mich., 109) that parties and their privies can obtain relief

from a fraudulent decree only in a direct proceeding for that purpose in the court where the original proceeding was had.

In *Potter v. Ranlett* (116 Mich., 454) it was held that a decree of the circuit court which had not been appealed from could not be attacked collaterally except for want of jurisdiction.

While the Bureau and this Department have unquestioned authority to consider the questions of fraud and jurisdiction in cases before the courts involving the marital status of parties, yet, as held in the case of *Cooper v. Cooper* (13 P. D., 208), claimants under the act of March 3, 1899, should test the validity of alleged fraudulent divorces in the courts where the divorce was procured, or impeach its validity by proper proceeding in another court; that public policy and administrative duty require that questions of this nature should be left to the courts, and that parties questioning the validity of a decree or judgment of a court of general jurisdiction over the subject-matter collaterally, in a proceeding of this nature, should be relegated to the courts for their remedy.

So, also, in the case of *Lynch v. Lynch* (ibid., 447), it was held that—

So long as a decree of divorce, prima facie valid on its face, is judicially unimpaired it should be accepted by the Pension Bureau and this Department as conclusive of the marital status of the parties, at least, so long as the parties to the decree are alive and the courts open to their relief; that public policy and good administrative duty require that questions of this nature should be left to the courts. Citing *Cooper v. Cooper*, supra, and *Powell v. Powell* (13 P. D., 236).

So, also, in the case of *Burdette v. Burdette* (14 P. D., 146), it was held that claimant having submitted her domestic controversy to the courts, she is bound by their judicial decision therein, no appeal having been taken therefrom.

The decision of the Michigan circuit court in chancery, in the case under consideration, appears to have been in line with departmental decisions in the cases of *Forbin v. Forbin* (13 P. D., 120), and authorities therein cited; *Brobst v. Brobst* (ibid., 218); and *Strunk v. Button* and *Strunk* (14 P. D., 17), which involved the question of the validity of a second or subsequent marriage and the law, as well as the rule of evidence, applicable thereto, assuming that the evidence before the court was of the same character as the ex parte testimony in this case.

But aside, and independent of this, the Department is of the opinion that pensioner having submitted the question of the validity of his marriage with claimant to a court of competent jurisdiction he is bound by the final judicial determination thereof, no appeal having been taken therefrom.

The only remaining question raised by the appeal is whether or not claimant is in necessitous circumstances; and it is insisted that she is not because she is the owner of 7½ acres of land, with improvements,

for which she was offered \$500 in 1896; that while she had deeded 3 acres of said land to her daughter, the validity of the deed is questioned, and it is contended, in effect, that claimant retained a life interest in the same. It is admitted, however, that the buildings are upon the $4\frac{1}{2}$ acres occupied and owned by claimant.

The evidence fails to show that the deed of the 3 acres to claimant's daughter is fraudulent or void. It was executed prior to claimant's marriage to pensioner, and she had the undoubted right to make said conveyance. Her life lease therein, if such exists, is of but little value, as the remaining $4\frac{1}{2}$ acres appears from the evidence to be worth but about \$200, the highest assessment valuation thereof being but \$180 in 1903, under a law which requires the property to be assessed at its true value. In 1900 it was assessed at but \$75. Claimant is shown to be about 65 years of age, in feeble health, and dependent in part upon charity for the necessities of life. It can not truthfully be said that she is not in necessitous circumstances as that term in said act is construed. See *Hunter v. Hunter* (14 P. D., 136) and authorities therein cited.

Claimant has filed voluminous testimony of her neighbors and reputable witnesses as to her good moral character, and this testimony is not rebutted by any evidence in the case or questioned by anyone but pensioner and his son. Pensioner does not raise the question in his appeal.

After careful consideration of all the evidence and the arguments in behalf of pensioner, the Department is clearly of the opinion that the evidence in this case fairly establishes the facts necessary to prove claimant's title to one-half her husband's pension under the first proviso of the act of March 3, 1899, viz, that she is the lawful wife of pensioner; that he had deserted her for over six months immediately prior to the date on which she filed her application under said act; that she is a woman of good moral character and in necessitous circumstances.

The action appealed from is accordingly affirmed

DIVISION OF PENSION—EVIDENCE—MARRIAGE—PRACTICE.

WARDWELL v. WARDWELL.

Where claimant has filed a valid declaration under the first proviso of the act of March 3, 1899, with proof in support thereof sufficient to establish a *prima facie* case under the law, and no evidence is filed by pensioner after due notice of said claim, the rejection of her claim on the ground that she "has failed to furnish the evidence necessary to establish her title within the meaning of the act" is error.

It is a rule of evidence, recognized and enforced by Federal and State courts generally, that a party attacking a duly established marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage must not only prove a valid prior marriage, but also that it has not been dissolved in any manner at the time of the subsequent marriage, even though it involved the proving of a negative; that every presumption is in favor of the validity of the established marriage, and all these presumptions must be overcome by satisfactory, irrefragable proof, the burden of proof being upon the party attacking the marriage.

Legal wifehood is established, *prima facie*, under act of March 3, 1899, by proof of marriage under the general rules of evidence applicable thereto, and claimants are entitled to the benefit of the presumptions in favor of marriage.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
November 19, 1903.*

Mrs. Lucinda A. Wardwell, by her attorney, Augustus B. Tolman, appealed July 27, 1903, from the Bureau action of July 18, 1903, rejecting her claim filed April 16, 1903, for one-half the pension of her husband, Alfred Wardwell, a pensioner under certificate No. 971477, the ground of rejection being that—

Claimant has failed to furnish the evidence necessary to establish her title within the meaning of the act of March 3, 1899.

It is contended in said appeal as follows:

This claimant and the soldier separated some thirteen or more years ago for the last time in Lynn, Mass. * * * The soldier had been twice previously married and the claimant once before. With the exception of some explanation of alleged discrepancies in the testimony in regard to which explanations were asked the following was called for by the Pension Office:

1. Evidence showing the number of times each was married before their marriage to each other, and the death of each former husband or wife.

2. Proof that the claimant was never divorced from the soldier.

We respectfully contend that this evidence, the attempt to procure which was the sole cause of the inability of the claimant to furnish the necessary evidence within the time allowed, was unnecessary and to require it was error. A ceremony having been performed the presumption was that the marriage was legal, and no burden should be placed on a claimant to further establish it. And this presumption exists even when there is known to be a previous marriage. (19 Am. and Eng. Enc., 2d ed., pp. 1207-1209; U. S. v. Green, 98 Fed. Rep., 63.) In the case cited the court held that proof of the existence of a prior marriage did not change the presumption. And where a previous marriage is proved the person attacking the last marriage must go further and prove that the prior marriage was valid, and that there was no divorce, even though this requires him to prove a negative.

We are not unaware of the claim made that a pension being a gratuity and the testimony being *ex parte*, the Pension Office can require such evidence as it deems necessary to establish a claim. We do, however, contend that such reasons have no application in a contest between people occupying the relation of plaintiff and defendant, and to require a claimant to not only establish a *prima facie* case, but to anticipate any possible attack, is supported neither by law nor reason.

There exists no right, moral or legal, to place on one of the litigants a burden not placed there by the statute conferring the right, nor by any other statute, nor by common law as interpreted by the United States courts. The claimant having

proved that a marriage ceremony was performed between the parties, that she is in necessitous circumstances, of good moral character, and the desertion, she is entitled to rest her case and the burden is on the defendant to overcome the usual presumptions that exist in favor of one establishing these conditions.

These unnecessary requirements having prevented the proof of the case it is hoped that the plaintiff's willingness to obtain the evidence as rapidly as possible and the failure to establish all that could be legally required will not prevent the case being determined on its merits upon the questions of law. We are unable to say that the evidence called for can not be furnished, but the correspondence will require time and labor. We have seen no decision covering these exact points and feel that one should be rendered, so that an applicant may file all evidence with the application as required.

A copy of this appeal was duly served upon pensioner, as required by Rule 17 of Practice, and he was duly advised that he would be allowed thirty days from the filing of said appeal within which to file an answer, brief, or argument in opposition thereto, as provided in Rule 18 of Practice. More than thirty days having elapsed and pensioner having failed to enter his appearance, or make any opposition thereto, the appeal will now be considered on its merits.

Claimant filed her declaration and proof in support thereof April 16, 1903. The declaration contained all the necessary averment, which, if true, would entitle her to one-half her husband's pension under the first proviso of the act of March 3, 1899. Her proof consisted of a certified transcript of the record showing her marriage to pensioner at Lawrence, Mass., March 17, 1884. This certificate recited:

That the marriage of Alfred Wardwell, of Andover, aged 42 years (3rd mar.), and Lucinda A. (McFarland) Carpenter, of Andover, aged 41 years (2nd mar.), solemnized at Lawrence on the 7th day of March, in the year 1884, by Rev. Charles Parkhurst, Lawrence, appears of record in this department by the duly attested return of the clerk of the town of Andover for that year.

This certificate was dated Boston, Mass., November 10, 1902, and was certified under the State seal and signature of the secretary of the commonwealth.

Claimant also filed a certified transcript of an order of the probate court of Essex County, Mass., of March 23, 1896, directing the payment to her by her said husband of \$12 per month for her support. She also filed the separate affidavits of two credible witnesses who testified that pensioner had deserted claimant and had not contributed anything toward her support since 1890; that she had no property or income or means of support except \$2 per week, which she received for caring for her granddaughter, and her board, which she received for keeping house for her daughter; that she was in necessitous circumstances, and a woman of good moral character.

It is true there is a discrepancy in these two affidavits as to the dates of the final desertion, 1888 and 1890, both being given as the time of the final separation, but this variance of date was immaterial, as in either event the desertion, if continuous, as the evidence indicated, had

existed for more than six months prior to the date on which claimant filed her said declaration.

The judicial determination of the probate court in 1896, besides finding that claimant was in necessitous circumstances and that she was entitled to support from pensioner, could only have been reached by finding that she was the wife of pensioner and that he had neglected, deserted, or abandoned her. Her claim for relief before said court was founded upon her marital relation to pensioner and his default.

That the foregoing evidence constituted proof sufficient to establish a prima facie case was conceded by the Bureau, in effect, when said declaration and proof were accepted and filed, the pensioner notified thereof, and payment of one-half of the pension in controversy was suspended. It thus appears that claimant had complied in this respect with the requirements of the law, the Rules of Practice before the Commissioner of Pensions, and the decisions of this Department.

In the case of *Adams v. Adams* (12 P. D., 370-378), decided May 8, 1902, it was held that—

The application or declaration of a claimant, under said act of March 3, 1899, like an appeal by claimant or pensioner, serves the purpose of a writ of supersedeas, or other similar writs, and should stay further Bureau proceedings, so far as they involve further payment of the one-half of the pension in controversy, pending the adjudication of the claim by the Commissioner of Pensions. * * *

In future applications under this act for division of pension you will require the claimants to file with their declarations proof in support thereof sufficient to establish a prima facie case under the law.

Following said decision, the Bureau, on May 21, 1902, issued the following instructions and Rules of Practice before the Commissioner of Pensions, and now embraced in Order No. 69, of May 20, 1903, a copy of which order is published as an appendix to departmental decision of August 17, 1903, in the case of *Bowman v. Bowman* (14 P. D., 120), viz:

In the adjudication of claims under the act of March 3, 1899, the following Rules of Practice, amending the Rules of Practice of May 21, 1902, will be observed and followed:

1. All claimants under the act of March 3, 1899, will be required to file with their declarations proof in support thereof sufficient to establish a prima facie case under the law.

2. Where the claim is filed by the wife, alleging that the pensioner has deserted her for a period of six months or more subsequent to March 3, 1899, and prior to the filing of the declaration, the declaration must be accompanied by evidence showing that she is the wife of the pensioner, that the pensioner has deserted her for the period alleged in the declaration, and that she is a woman of good moral character and in necessitous circumstances.

* * * * *

8. A declaration unaccompanied by evidence as indicated herein sufficient to establish a prima facie case will not be considered as conferring any right upon the claimant or as serving notice upon the Bureau sufficient to warrant the suspension or the withholding of any part of the pension due or owing to the pensioner. Upon receipt

of a declaration unaccompanied by evidence as indicated herein it should be promptly returned to the claimant, with a notification that until the same is remedied in accordance therewith it can not be considered.

* * * * *

15. Where a prima facie case has been filed by the wife the pensioner will receive the usual notice of the filing of the claim, and will be allowed thirty days, as herein provided, from the receipt of said notice to answer the allegations made by the wife. * * *

When, therefore, the Bureau accepted, filed, and considered claimant's declaration and proof it was equivalent to a finding that she had complied with said rules and established a prima facie case, which, in the absence of proof to the contrary, would entitle her to the benefits of said act.

It appears that pensioner was duly advised by the Bureau, May 11, 1903, of his wife's said claim, and he appears to have acknowledged the receipt of said notice at Lynn, Mass., May 16, 1903. He failed, however, to file any testimony, to enter his appearance, or to offer any defense in said case.

On April 30, 1903, without any additional testimony in the case, or anything to impeach, outweigh, or discredit the prima facie case established by claimant, the Bureau called upon her attorneys for further evidence, and, no further evidence being furnished, on June 25, 1903, a second communication was sent said attorneys embracing the same call for testimony as the first communication, which latter communication is as follows:

Relative to the claim of Lucinda A. Wardwell, under the act of March 3, 1899, for one-half the pension allowed Alfred Wardwell, certificate No. 971477, you are advised that there is required the claimant's sworn statement showing the exact date of the desertion of her by the pensioner, and all the facts and circumstances leading up to and connected therewith, which statement should be corroborated by the testimony of credible, disinterested witnesses who have personal knowledge of the facts.

In this connection it is proper to state that the evidence of Mrs. Emma L. Lee and John F. Carpenter relative to the desertion is unsatisfactory for the reason that the statements contained therein relative to the dates of same are conflicting. In their respective affidavits the date of desertion is given as March, 1890, both witnesses stating in the affidavits that the "pensioner deserted the claimant for the last time in 1888."

It is noted also that the claimant, on March 23, 1896, obtained a decree from the probate court at Newbury, Mass., requiring the pensioner to pay to her on the first of each month for her support and that of the minor children the sum of \$12, and the claimant should state under oath what payments, if any, have been made to her by the pensioner in pursuance of said decree.

There is also required the evidence of at least two disinterested, credible witnesses, who have known the claimant since she became of marriageable age and who have personal knowledge of the facts, showing the number of times and to whom she was married prior to her marriage to the pensioner, and also evidence showing the number of times and to whom the pensioner was married prior to his marriage to her.

There should also be filed competent evidence showing in what manner such marriage or marriages were dissolved—whether by death or divorce; if by death, there should be filed a duly certified transcript of the public record, if in existence, showing such death, and if no such record exists the claimant should state that fact under oath and file the evidence of at least two disinterested, credible witnesses who have

personal knowledge of the facts, showing such death and the date thereof; if by divorce, there should be filed a duly certified copy of the decree of divorce.

There is also required the evidence of at least two disinterested, credible witnesses who have personal knowledge of the facts, in corroboration of the claimant's allegation that she was never divorced from the pensioner.

All evidence must be under oath, and the witnesses testifying in behalf of the claimant should state their ages, post-office addresses (giving street and number, if any), and means of knowledge of the facts to which they testify; and their credibility should be certified, so far as possible, by the officer administering the oaths, in his own handwriting.

The above indicated evidence was called for under date of April 30, 1903, and no response has yet been received to said call. Claimant will be allowed fifteen days from the receipt of this letter within which to file the evidence indicated herein, and if, at the expiration thereof, such evidence is not on file, it will be deemed that she has abandoned her claim, and action will be taken accordingly.

No further evidence being furnished in response to said communications, the claim was rejected on the ground heretofore stated, and from this rejection the appeal is taken.

It is to be noted that the claim was not rejected on the ground that claimant had abandoned her claim, but on the ground that she had failed to furnish "evidence necessary to establish her title."

The Bureau had already decided, when accepting her declaration and proof, that claimant had established, *prima facie*, her title. When was this *prima facie* case destroyed? Certainly not by her failure to furnish proof which the law, rules, and regulations do not require.

The requirement that she should show the exact date of the desertion, desertion not being denied by pensioner, and that the discrepancy of dates as to desertion should be accounted for, said discrepancies being, for reasons already stated, but immaterial variance of dates, as well as the requirement that she should state "what payments, if any," had been made her under the decree of the probate court, in view of the fact that she had already furnished the testimony of two credible witnesses that pensioner had contributed nothing toward her support since 1889 or 1890, all appear to have been vexatious, needless, and unauthorized by the status of the case, or the law, rules, and regulations applicable thereto.

The only remaining call for additional evidence left for consideration is that which relates to her title as the wife of pensioner. Claimant had proved her marriage to pensioner by evidence which would be accepted by the courts of Massachusetts, where she resided, and the courts, State and Federal, generally as sufficient, and which had been accepted by the Bureau as, *prima facie*, sufficient. It is true that it is only the "lawful wife" who is entitled to one-half the pension of her husband, but upon proof of marriage the law presumes in favor of the validity of the marriage and that they are lawfully husband and wife. The marriage, or its subsisting legality and validity, was not denied by pensioner, who is the only party pecuniarily interested in the question, yet the Bureau, by its call for further evidence, required her to

establish what the law presumed to be already established, i. e., that she and pensioner were legally competent to contract a marriage and that such marriage continued to exist until dissolved by death or divorce. All of these questions involving the competency of the parties to contract are presumed to be inquired into at the time of the marriage, and are matters of defense when the validity of said marriage is brought in question. The proof then rests upon the party attacking the validity of the duly established marriage. This is a rule of evidence as well as of law. As announced in the case of *Strunk v. Strunk* (14 P. D., 17):

It is a rule of evidence, recognized and enforced by Federal and State courts generally, that a party attacking a duly established marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage, must not only prove a valid prior marriage, but also that it has not been dissolved in any manner at the time of the subsequent marriage, even though it involved the proving of a negative; that every presumption is in favor of the validity of the established marriage, and all these presumptions must be overcome by satisfactory, irrefragable proof, the burden of proof being upon the party attacking the marriage.

See also departmental decision in the case of *Forbin v. Forbin* (13 P. D., 120), *Brobst v. Brobst* (*Ibid.*, 218), *Willie v. Willie* (14 P. D., 43), and the authorities cited in said decisions.

No vexatious or unnecessary burdens or requirements should be imposed upon either the claimants or pensioners in the prosecution or defense of claims for division of pensions under the act of March 3, 1899. Claimants in this class of cases are frequently, and, in meritorious claims, generally, people of limited means and should not be required to incur unnecessary or useless expense in furnishing proof which good practice or the rules of evidence and the law do not require.

The Rules of Practice before this Department, numbers 16 to 20, inclusive, approved February 5, 1903, as well as the Rules of Practice before the Commissioner of Pensions, as embraced in Order 69, heretofore referred to, are designed to simplify, systematize, and expedite the prosecution and adjudication of claims under the act of March 3, 1899.

To apply the same tests and precautions as to the proof of marriage in claims for division of pension as is usually applied in claims for widows' pension is to impose useless and unnecessary labor and expense both upon the Bureau and claimant. As has been frequently stated, claims under the first, second, and third provisos of the act of March 3, 1899, are in the nature of a suit at law for the recovery of money or to establish title. As stated in the case of *Hyatt v. Hyatt* (14 P. D., 8):

These claims being in the nature of a suit at law, and being between opposite parties, the rules as to notice are carefully observed.

When, therefore, a claimant has alleged and proved a marriage by producing a certified transcript of a record of marriage of claimant to

pensioner, or has established by other satisfactory evidence the celebration of a marriage ceremony between them, or by other proof of their marriage contracted and followed by cohabitation as husband and wife, or valid and satisfactory proof of a common-law marriage consummated in States where common-law marriages are not prohibited, and the alleged pensioner husband is duly notified thereof, as required by paragraph 15 of said Order 69, she should not be called upon, in the absence of any evidence questioning the validity or legality of such marriage, to furnish proof of the legal qualifications of either herself or her alleged husband to contract said marriage, as the burden of proof to disprove the subsisting validity of the established marriage is upon the husband or the party questioning its validity.

There appears to be no valid reason why, in this class of cases, the general rule of law and evidence should be changed and the burden of proof shifted upon the claimant. By observing and applying the well-known rules of evidence much time and expense will be saved the Bureau, as well as claimants and pensioners, in the adjudication of claims, and no possible loss or injustice will be suffered or sustained by the Government, the claimant, or the pensioner, but the benefits conferred by the act of March 3, 1899, will be more expeditiously, economically, and justly conferred upon the beneficiaries.

Where a claimant has filed a valid declaration under the first proviso of the act of March 3, 1899, with proof in support thereof sufficient to establish a *prima facie* case under the law, and no evidence is filed by pensioner and her *prima facie* case is not destroyed or rebutted, the rejection of the claim, on the ground that claimant "has failed to furnish the evidence necessary to establish her title within the meaning of the act," is error.

When Congress used the words "lawful wife" in said act there is nothing to indicate that it was intended to thereby change the rule of evidence as to proof of marriage or to deprive her of the benefit of the legal presumption in favor of marriage, but, on the contrary, the further language of the act requiring the Commissioner of Pensions, upon being satisfied by "competent evidence" of such desertion, would indicate that Congress intended no change in the usual methods of proving wifehood or desertion.

Lawful wifehood is established *prima facie* under the act of March 3, 1899, by proof of marriage under the general rules of evidence applicable thereto, and claimants are entitled to the benefit of the presumptions in favor of marriage.

As the claimant in this case had established a *prima facie* case, which was not impaired or destroyed by any evidence, and as pensioner had due notice of her said claim and interposed no defense, the rejection of her claim upon the ground stated was unwarranted, and said action is accordingly reversed.

ADULTEROUS COHABITATION—MARRIAGE AND DIVORCE—
IMPEDIMENT.

ANNIE L. TRIPP (WIDOW).

1. The fact that claimant kept house for a second cousin after his wife's death and lived with him for sixteen years, together with the testimony of one witness who says he saw them both coming out of the same bedroom one morning, is not sufficient to establish the claim that such claimant lived in open and notorious adulterous cohabitation, in the face of the denial of each of the parties, corroborated by the evidence of the postmaster and the near neighbors of claimant who say they never heard of any immoral conduct between said parties, and that they were considered and believed to be upright, honorable, and moral people.
2. The fact that claimant, prior to her marriage to the soldier, lived for nineteen years with one Burch in the relation of husband and wife and bore him six children, coupled with the fact that they separated and each thereafter married again, and testimony showing that the agreement between Burch and claimant was that they should live together as husband and wife so long as they could agree, is not sufficient to establish a common-law marriage.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
November 19, 1903.*

Cornelius F. Tripp, formerly a private in Company A, One hundred and twenty-fifth New York Volunteer Infantry, was, at the time of his death from dropsy July 10, 1880, a pensioner under the general law, with a rating of \$12 per month, on account of gunshot wound of jaw and mouth. On January 8, 1881, his widow, Annie L. Tripp, filed a declaration for pension under the general law, which was eventually rejected on the ground that the soldier's death was not due to his military service, but meantime, May 25, 1891, she had also filed a claim under the act of June 27, 1890, which latter claim was rejected November 27, 1899, on the ground that she had forfeited her title to pension by living in open and notorious adulterous cohabitation with one Eleazor Larrabee since the soldier's death, as shown by evidence obtained on special examination.

On June 25, 1901, claimant filed her own affidavit and those of Eddie Card and Charles A. Miller, with a view to the reopening of said claim, which application for reopening was denied March 26, 1901, because said testimony was not deemed sufficient to controvert the evidence on file when the action of rejection was taken.

From these adverse actions in the claim under the act of June 27, 1890, claimant's attorney took an appeal May 1, 1901, contending that the evidence filed in support of the application for reopening shows not only that his client is not guilty of the specific offense charged against her, but bears a good reputation in the community where she has resided for nineteen years last past.

It appears in evidence that for about nineteen years prior to the ceremonial marriage to the soldier the claimant, whose maiden name was Anna L. Harrington, and one Jacob Burch lived together and sustained toward each other all the relations of husband and wife.

and that during that period she was known as Mrs. Burch and bore six children. Her relations with Burch terminated shortly before she was ceremonially married to the soldier, December 29, 1875, by a justice of the peace. The immediate cause of the separation seems somewhat in doubt. Burch testified, in deposition taken before Special Examiner Linnell September 26, 1899, that he would always have kept and regarded claimant as his wife, but she "got to running after Tripp and went off with him," but the claimant, in her deposition taken the same day, makes the following very different explanation of their disagreement.

I did not leave him entirely of my own accord. He was running with another woman, the one he is married to now, and I told him to choose between us, and he chose Mrs. Bentley. Then I got out.

Whatever the actual cause of the separation may have been, however, the fact that she subsequently married the soldier and Burch married Mrs. Bentley would indicate that neither of them then regarded their former relations to each other as a valid common-law marriage.

It further appears that after the soldier's death in 1880 the claimant earned a rather precarious support by working as a servant in various families, until about 1883, when she became domiciled in the home of a farmer named Eleazor Larrabee, where she has continued to reside, and with whom it was charged she has since maintained illicit relations.

In your report of October 17, 1902, transmitting the papers you expressed the opinion that the rejection of the claim, on the grounds hereinafter stated, should be adhered to, but it appearing to the Department from reading the evidence then on file that the special examiner who took the testimony of some of her relatives may have been somewhat influenced by their manifest enmity toward the claimant, and in view of the fact that the postmaster of the town near which she had resided for the past sixteen or eighteen years had testified that he had never heard anything against her moral character during that period, the papers were returned to your Bureau July 31, 1903, with instructions that the claimant be accorded the benefit of a special examination to be conducted by some other examiner who should be specially directed to conduct such examination in a thorough and impartial manner.

In your report of October 20, 1903, again forwarding the papers to this Department, you say:

Respectfully transmitted to the honorable Secretary with the evidence secured on special examination. The claim is now approved for rejection on the ground that claimant was not legally married to the soldier.

On the new face brief an amplified statement of the ground of this later rejection appears as follows:

Rejected on the ground that the claimant is not the legal widow of the soldier, never having been lawfully married to him, as she had a husband living and undivorced when she attempted to marry in 1875.

Taking up for consideration these actions of rejection chronologically, the evidence obtained on first special examination tended to show that claimant's relations with Larrabee were illicit. Sarah M. Riley, claimant's own sister, testified that it was her understanding that relations similar to those previously existing between Burch and claimant now prevail between her and Larrabee, although she had no personal knowledge of the fact, never having visited her sister at Larrabee's house.

Clarence Priest, claimant's nephew, swears that he spent a night at Larrabee's house in the summer of 1899, and after he arose early next morning, he saw Larrabee and claimant come out of the same bedroom. Larrabee, in his deposition taken before Special Examiner Charles W. Linnell, September 26, 1899, testified as follows :

I am the man in whose house Annie Tripp has lived for about sixteen or seventeen years. I hired her to work at housework and help in the care of my parents who were old. I did not promise her any specific pay ; said I would give her food and clothes and some spending money. I have never paid her wages. She has had the poultry money for her own and whenever I have had a spare dollar I have given it to her.

In response to the direct question, "Do you state under oath that you never had sexual connection with Annie Tripp ?" he said :

I wont answer that. I wont give any woman away. You can think what you like.

Mrs. Julia M. Gleason, who has known claimant from childhood, and stood up with her when she was married to the soldier, testified that—

Some people that had been there say they slept together—her and Larrabee—but I do not know. The parties I mean were Clarence Priest and the two Riley boys, sons of Sarah M. Riley.

The deposition of Charles A. Miller, whose affidavit had previously been filed in the case, was not taken by Special Examiner Linnell. In said affidavit the affiant testified that he is postmaster at Johnsonville, N. Y.; that claimant had resided at Larrabee's house, within half a mile of the post-office, for the past sixteen years, and during that period he had never heard anything against her moral character. He further testified as follows:

Deponent can truthfully say that if the claimant had lived in this neighborhood in open and notorious cohabitation with Eleazor Larrabee, or any other person, deponent, as well as others in this neighborhood, would have heard something of it, and deponent can truthfully say such is not her reputation in this community where she resides.

It appears that upon the return of the papers to your Bureau for the purpose of a further special examination the case was placed in the hands of Special Examiner H. P. Maxwell, who took the depositions of eight witnesses, including Postmaster Miller, all of whom testify that claimant bears a good reputation in the community in which she

resides. Examiner Maxwell, in his official report to the Bureau, says:

The testimony taken by me is that of persons who have lived in the house with claimant and Eleazor Larrabee, and their nearest neighbors, who have been on terms of intimacy with the parties in question. In addition to the testimony herewith I saw and interviewed John Dorr, mentioned by Mr. Larrabee, and his (Mr. Dorr's) wife, and they spoke in high terms of claimant as well as of Mr. Larrabee. I asked them to make a sworn statement to me, but this they declined to do for the reason that they are old and fearful that to make such a statement it might be the cause of their having to attend court. They are well to do people and are reliable, but very much afraid of "the law;" therefore would not testify, and I did not press the matter, for the reason that I already had testimony covering the time of which they had knowledge.

Claimant is an old and decrepit woman; very nervous and easily confused by reason of hebetude. In making inquiries in the neighborhood, outside of her immediate circle, I failed to hear a word derogatory of her moral character. Everyone with whom I talked about her spoke of her as a quiet, hard working, and inoffensive woman.

Postmaster Miller testified as follows:

I am 39 years of age; my post-office address is Johnsonville, Rensselaer County, N. Y. I am the postmaster at said place, and have held that office during the past five years. I have known the claimant, Annie L. Tripp, for the past six years. She is living with one Eleazor Larrabee as his housekeeper. This has always been my understanding of the matter.

Q. What is the reputation of this claimant for chastity and morality in this community?—A. It is all right as far as I have ever heard. I have never heard anything to the contrary.

Q. If she had been an adulterous woman, during your knowledge of her, would you have known or heard of it?—A. I should naturally think I would for the reason that, holding the public position that I have held for the past five years, I would have heard it as a part of the gossip of the neighborhood. Her mail has always come to the address of Annie L. Tripp, and never in the name of Mrs. Larrabee. She has lived within a half a mile of this office during my entire knowledge of her, and as I say, I have never heard a word derogatory of her in any way.

Eleazor Larrabee, who, in his former deposition, had made an apparently very damaging statement in response to a direct question asked by Special Examiner Linnell, testified as follows:

I have known the claimant, Annie L. Tripp, for about twenty-three years, and she has been in my employ for the past sixteen or eighteen years as my housekeeper. We are second cousins. She came to my house after my wife died to take care of my parents, and she took care of them as long as they lived. My mother died first and father died after I moved to this neighborhood. I came to this neighborhood about fourteen years ago. After father died, Mrs. Tripp continued to stay with me as my housekeeper, and she is still with me in that capacity. She has never been here as my wife or in an adulterous manner. We have never occupied at any time the relation of husband and wife. We have never occupied the same room and bed together, and have never lived in adultery with each other. We have lived in this neighborhood for about fourteen years last past, and our neighbors can tell you of the relationship that has existed between us during all of said years. I have also had hired help about me occasionally, who have slept in my house while employed by me, and if found they can tell you of our relationship. Amos A. McChestney is

now employed by me for the past two months. Prior to him Ebenezer Griffin was with me last year. The last I heard of him he was working for a man named Charles Giles, near West Hoosick, and before him Edward Card had worked for me off and on for four or five years, and I do not know but longer. Mr. Card is the first man I hired after I came to this place. There was a man named Wilber that worked for me some at a time when Mr. Card was not with me, but I do not know where he is, but I think he is dead. Prior to my coming to this neighborhood I lived about 8 miles from here near South Pittstown, this county. I was living there when this claimant first came to live with me. Andrew Kittley was my next neighbor, but his wife died and he moved away to parts unknown to me. The next family to me was John Dorr, but he has also moved away. You can probably get his address at the post-office at this place. All the other neighbors at South Pittstown have either died or moved away. I can not refer you to any others in that locality that would know anything about me while I lived there. I state on my oath that this claimant has never occupied any other relation to me than that of my housekeeper.

Upon reading all the evidence in this case bearing upon the question of the widow's illicit relations with Larrabee, it is observed that the only witness who has testified from alleged personal knowledge of the facts is Clarence Priest (a nephew of claimant), who, according to Special Examiner Linnell's official report, does not bear a good reputation in the community, and it may be here properly mentioned that said special examiner reports the same thing in regard to the reputation of Julia M. Gleason and Sarah Riley, whose testimony he took about the same time, although he adds, "But I believe in this case they told the truth."

But if, for the sake of the argument, it be accepted that Priest did tell the truth when he testified that he saw claimant and Larrabee coming out of the same bedroom one morning, and that Larrabee declined to answer the question put to him by Special Examiner Linnell because a truthful reply would have been an admission that he did have, on one occasion, at least, illicit intercourse with claimant, those facts, alone, would not be sufficient to establish the condition of "open and notorious adulterous cohabitation" contemplated in the act of August 7, 1882.

The rule followed in the case of *State v. Marvin* (12 Iowa, 499) may be properly applied in the case at bar. In that case the accused parties lived together in the same house in the relation of master and servant, and on two occasions the defendant, Marvin, was seen getting out of bed with the female defendant. The jury returned a verdict of guilty, and judgment was entered for the State, but on appeal the judgment was reversed. The appellate court said:

The defendants were not living together as man and wife. Secret acts of intercourse would not make them liable. The burden of the offense is the open, lewd, lascivious conduct of the parties living together as man and wife. It is the publicity and disgrace, the demoralizing and debasing influence that the law is designed to prevent.

In Virginia, under a statute similar to that in Iowa, it was held in the case of *Pruner v. The Commonwealth* (10 Va. Law J., 520) that—

To constitute the offense of lewd and lascivious cohabitation, within the meaning of the statute, it must be shown that the parties lived together openly and notoriously, as though the marriage relation existed between them; occasional acts of incontinence are not sufficient.

In the case of *Sarah J. Grooms* (7 P. D., p. 207), the act of August 7, 1882, was construed as applying alike to pensioners and applicants for pensions, and it was further held that—

Open and notorious adulterous cohabitation by a widow, as contemplated by said act, may be proved by her conduct in habitually, openly, notoriously consorting with one or more persons of the opposite sex under circumstances which would lead the guarded discretion of a reasonable and just man to infer from such relation, as a necessary conclusion, that it was illicit.

From a careful consideration of all the evidence in the case, it satisfactorily appears that, during her widowhood, the claimant has endeavored to live a blameless life, and has not, during that period, been guilty of such unlawful conduct as would, by the provisions of the act of August 7, 1882, work a forfeiture of her title to a pension.

The action of November 27, 1899, rejecting her claim on the ground that she has violated said act is, therefore, reversed.

From the later action of the Bureau, rejecting the widow's claim on the ground that she is not the legal widow of the soldier, has not yet been appealed from, and for the probable reason that she has not been advised as yet of such adverse action, but the evidence on file when the claim was previously rejected, and that obtained since, appears to the Department to so clearly establish that she was the lawful wife of the soldier that that feature of the case will be disposed of at this time, and further delay incident to the formal filing of a second appeal be thus avoided.

The only question for consideration in this feature of the case is whether or not the claimant's relations to Burch prior to her ceremonial marriage with the soldier were such as to establish a common-law marriage that was irrevocable by the parties without the intervention of a divorce court. The fact that they, in the absence of a ceremonial marriage, commenced to live and cohabit together as husband and wife when claimant was very young, and maintained such relations for about nineteen years, six children being born to them during that period, is established by the evidence; but whether or not they ever did or did not verbally agree to be husband and wife, at any time, is not established, and, for the purposes of this case, that question is not of serious importance. In her application for a pension under the general law, in January, 1881, she alleged that she was married to Burch in 1857, but did not say whether it was a ceremonial or common-law marriage. In her first deposition, taken before Special

Examiner Linnell, in 1899, she denied a marriage with him, but admitted that she was called Mrs. Burch while she was living at his house. In her deposition of September last she denied marriage, but admitted that she and Burch had a verbal agreement to have each other as husband and wife as long as they could agree, and in this statement is corroborated by the evidence of Julia M. Gleason, who, in her deposition of September 25, 1899, testified that "they agreed to live together only as long as they could agree, and after they got to quarreling they parted."

Burch testified, in his deposition before Special Examiner Linnell, in September, 1899, that they had lived together as husband and wife for nineteen years; that claimant was then known as and called "Mrs. Burch." He further testified, "I knew we formed a common-law marriage, and if she had not left me I would have always kept her and regarded her as my wife until she died," but in response to the question, "Why is she not now your legal wife?" he said, "Because she left me and married Tripp, and that cleared her from me. Then I married the Widow Bentley, about four years later, and I call her my legal wife."

Bishop, in his work on Marriage and Divorce (sec. 513), in speaking of evidence of marriage by cohabitation and repute, says:

Its weight depends on the circumstances of the individual case, controlled by matter happening even after the cohabitation ceased, as by cessation itself, the contracting of another marriage, and the like.

The claimant and Burch were during the nineteen years, and are yet, citizens of the State of New York, in which State common-law marriages, under certain conditions, are recognized to be equally valid with those made in facie ecclesiæ or in the presence of a civil magistrate (Atty. Gen. Butler, Op., 287), but under the facts and circumstances of the case at bar it is not believed that the conclusion reached by the Bureau would be upheld by the courts of that State. In the case of *Newton v. Southworth* (7 N. Y. State, 130), decided in 1887, the facts are so similar to those in the case at bar that they are here set out at some length.

Dolphin Harrison and Lydia A. Harrison executed a mortgage in which it was stated that they were husband and wife. In the foreclosure proceedings it was conceded on the hearing, by the parties who disputed the existence of said relation, that the mortgagors had lived and cohabited together and held themselves out to the community as man and wife, continuously, for thirty years; that they were generally reputed to be husband and wife in that community; that she bore the name of Lydia A. Harrison, and that during said period of cohabitation five children were born unto them, whom said Harrison acknowledged as his children, and they bore his name. But in said concession it was expressly stated that it was not conceded that the intercourse of

Dolphin and Lydia was that of lawful husband and wife. The supreme court said:

The facts thus admitted were of themselves sufficient to raise the presumption of marriage, even although the fact appeared, as it did by the testimony of Lydia, that there was no ceremonial marriage. A present agreement between parties competent to take each other for husband and wife is enough, in this State, to constitute a valid contract of marriage, and such an agreement may well be presumed from the facts above stated, if there is nothing in the case to repel such presumption.

It has been said that the presumption of marriage from cohabitation, apparently matrimonial, is one of the strongest known to the law, especially in a case involving legitimacy, and the presumption can only be repelled by the most cogent and satisfactory evidence. *Hynes v. McDermott* (91 N. Y., 451), and cases cited therein. The countervailing evidence in this case, we think, meets the requirements of that rule. -

In 1863 Harrison and Lydia separated and ceased to live together. In July, 1864, Harrison married the respondent, Laura A. Harrison, and in July, 1865, Harrison being then living, Lydia married John H. Southworth. Each of these marriages was ceremonial, and if Lydia was the lawful wife of Harrison each of those marriages was bigamous.

But the law presumes against the commission of crime, and that presumption stands opposed in this case to the presumption against illicit intercourse and neutralizes it. As was said by Gilbert, J., in *Foster v. Hawley* (8 Hun., 68, 72), we can not raise a presumption of a contract of marriage when the direct consequence of so doing would involve both parties to it in the crime of bigamy. See also *Jackson v. Claw*, 18 Johns., 346; *Clayton v. Wardell*, 4 N. Y., 230; *Chamberlain v. Chamberlain*, 74 id., 423.

The facts and circumstances of the case at bar, as disclosed by the evidence, are so nearly identical with those in which the foregoing opinion was rendered that there can be no possible question that, in the State of New York, where claimant and Burch resided during their intercourse, the law would recognize said relations as mere concubinage, and as the intercourse was terminated prior to the ceremonial marriage of claimant to the soldier it can not, properly, be held to affect her title to pension.

The action rejecting the claim for pension on the ground that she is not the legal widow of the soldier is, therefore, also reversed.

SERVICE—ENLISTMENT—MUSTER—DISCHARGE—RECORD.

GRAHAM THORN.

Claimant was pensioned under the act of June 27, 1890, but his name was dropped from the roll on November 9, 1901, on the ground that he was a rejected recruit and, therefore, not in the United States service as an enlisted man. Restoration to the rolls was refused on the ground that the records of the War Department show that claimant was not in the service of the United States.

The records and the evidence taken on special examination show that he was in the service of the United States more than ninety days, having been enlisted June 13, 1862, and discharged to date from December 18, 1862.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
November 19, 1903.*

Graham Thorn, formerly a private of Company H, Tenth West Virginia Volunteer Infantry, was pensioned under the act of June 27, 1890, with a rating of \$8 per month from September 6, 1890, on account of disability due to rheumatism and nasopharyngeal catarrh. On November 29, 1901, his name was dropped from the rolls on the ground that the pensioner was a rejected recruit and, therefore, not in the United States service as an enlisted man.

From this action of the Bureau his attorneys took an appeal, contending as follows:

It is submitted that the action of dropping is erroneous. It is alleged by the soldier that he was enlisted on June 13, 1862, and was honorably discharged on December 18, 1862, and he has been granted a certificate of that fact by the Adjutant-General, United States Army. The action of dropping appears to be based on a change of opinion in the Bureau of Pensions as to applicant's pensionable service, because he was never mustered in. It has been held (Wm. N. Davis, 7 P. D., 333) that muster in is not essential to pensionable status under the act of June 27, 1890. It is also submitted that the former decision whereby claimant's name was placed on the rolls, should be held to be a thing adjudicated, and therefore not disturbed. See Jacob Nix, 4 P. D., o. s., 260; Charles F. Borthwick, 10 P. D., 249; and the cases therein cited.

In your report of December 13, 1902, transmitting the papers to this Department, you expressed the opinion that the action appealed from should be adhered to, the pensioner never having been in the service of the United States; but before finally disposing of the appeal the Department desired information as to the military service actually rendered by said pensioner and the papers were accordingly returned to your Bureau, July 31, 1903, with instructions that a special examination be ordered with that purpose in view.

In your report of November 5, 1903, again forwarding the papers, including the evidence obtained on the special examination, to this Department, you say:

Respectfully transmitted to the honorable Secretary with the opinion that the action appealed from should be adhered to. The Department holds in the case Thomas J. Moorman, No. 49, current series, that this Bureau is bound to follow the records of the War Department in cases where such records show the fact of enlistment and discharge.

* * * * *

If the record is erroneous, application must be made to the War Department to change it. The final holding of the War Department in the case in hand is that this soldier or claimant was never discharged, inasmuch as he was never in the military service of the United States. Special examination has been had as directed by the Department and the claim is again approved for rejection.

On the new face brief the exact ground on which the claim is now approved for rejection is stated in the following language:

Approved for rejection on the ground of no title.

The records of the War Department show that claimant was not in the service of the United States as a member of Company H, Tenth Virginia Infantry (subsequently known as Tenth West Virginia Infantry), as alleged.

See letter of honorable Assistant Secretary of Interior and S. E. Reports.

The testimony obtained on special examination consists of claimant's own sworn statement of his military history, and the depositions of two of his comrades, and the evidence of these three witnesses, whose good reputation for truth and veracity is certified by the special examiner, clearly establishes the fact that from enlistment, June 13, 1862, until discharge, December 18, 1862, he wore the uniform and performed all the duties usually required of a private soldier, or, in other words, just such services as were rendered by other soldiers of his rank in the same company. He was subject to the orders of his superior officers and to punishment for disobedience, and there can be little, if any, question that he would have been arrested and punished as a deserter if he had at any time during that period finally left the service without official leave.

An official report from the records of the War Department received at the Bureau November 24, 1894, shows that on the muster roll of his company, October 31, 1862, he is reported "absent at time of muster without leave since October 25, 1862," and on the muster roll of December 31, 1862, he is reported, "rejected last muster." From these two notations on the muster rolls it would clearly appear that he was regarded and treated by the officers of his company and regiment as a duly enlisted soldier during the entire period of his six months' military service. The same official report contains a complete personal description of the soldier, and the statement that the records further show that he was enrolled June 13, 1862, and discharged to date, December 18, 1862, "by reason of being a rejected recruit." The exact cause of his rejection is not stated, and from a more recent official report it appears that it is not a matter of record in said Department, but the testimony obtained on special examination tends to show that he was rejected on account of inguinal hernia which the soldier says he first noticed in the fall of 1862, while encamped at Montrose, W. Va., and this theory of the cause of his rejection is made still more plausible by the circumstances that he not only alleged rupture in his original declaration and in two claims for increase of pension, but a right inguinal hernia was observed at his first and two subsequent medical examinations, although it was not found to exist in a degree that would materially disqualify him for the performance of manual labor.

The official records in the office of the Auditor for the War Department show that the soldier was paid on company roll from June 15 to August 31, 1862, and that in December, 1867, he filed a claim for arrears of pay, which claim was suspended January 24, 1868, because no certificate of the soldier's honorable discharge was presented, and

eventually rejected January 17, 1871, on the ground of abandonment, no response having been made to a call for the discharge certificate.

To a request of the Bureau that there be furnished from the records of the War Department a report of everything of record relating to the military history of the soldier, where and when he joined the company and regiment or was received at rendezvous, when and where held to service, whereabouts from enlistment to discharge, when and for what reason he was rejected as a recruit, whether or not he was medically examined, and, if so, a copy of the certificates or examinations on file, the Chief of the Record and Pension Office of the War Department made the following official response:

Respectfully returned to the Commissioner of Pensions.

Graham Thorn was never in the military service of the United States as a member of Company H, Tenth Virginia Infantry Volunteers (subsequently known as Tenth West Virginia Infantry Volunteers). He was rejected as a recruit for that organization by the mustering officer on November 15, 1862.

In 1887 the Adjutant-General's Office issued to this man a certificate of discharge, setting forth that he was discharged "to date December 18, 1862, by reason of being a rejected recruit." This action was taken under a misapprehension of the powers of the Department in such cases and was void and without effect. The man not having been in the service of the United States as a member of the organization in question, was not, and could not have been discharged therefrom.

It was presumably in view of this report or opinion of the Chief of the Record and Pension Office of the War Department that the pensioner's name was dropped from the rolls a few days later, and his application for restoration rejected. And it very clearly appears that it is in view of said report or opinion together with a misconception or misapplication of what was held by the Department in the case of Thomas J. Moorman, No. 49, current series, that the claim for restoration is again recommended for rejection.

The soldier enlisted in good faith June 13, 1862, was duly enrolled, and had performed five months' honorable service and received two and a half months' pay as a soldier when he was rejected by a mustering officer, and, as shown by the testimony, he continued to serve until December 18, 1862, when he was told by his captain that he was at liberty to go home, whereupon he left the service.

The reason for his failure to respond to the call of the Auditor's office for his certificate of discharge is explained by the fact that it was not until 1887 that the Adjutant-General of the Army, with, presumably, the true history of the soldier's enlistment and actual military service before him, issued a certificate of honorable discharge to date December 18, 1862.

In May, 1892, records of the War Department then showing enlistment, service of more than ninety days, and an honorable discharge, and the soldier being otherwise entitled under the act of June 27, 1890, he was granted a pension of \$8 per month from September 6, 1890,

and continued to receive pension at that rate until his name was dropped from the rolls.

On January 28, 1893, the soldier filed a declaration for increase, which said claim was eventually rejected March 1, 1900, on the ground that the evidence failed to show that his then rating was not commensurate with the degree of his disability. On April 7, 1900, he again filed a claim for increase and, as an indirect result, his name was dropped on grounds heretofore stated.

The Department has repeatedly held that under the act of June 27, 1890, muster-in is not essential to the pensionable status of a soldier who duly enlisted and served ninety days during the war of the rebellion. The facts and circumstances in the case of Simon P. Chambers (6 P. D., 260) are not greatly dissimilar to those in the case at bar. The records of the War Department showed that Chambers enlisted October 1, 1863, was captured March 14, 1864, paroled April 16, 1864, admitted to hospital with abscess, and returned to duty May 20, 1864. And said records further disclosed that he was never mustered into service, but was rejected by examining surgeon June 29, 1864, by reason of disability, the nature or origin of which is not stated in said records.

In disposing of the appeal in that case the Department said:

As shown by this record the soldier was in the military service of the United States for a period of ninety days and received an honorable discharge therefrom. The requirement of the act of June 27, 1890, as to service is:—

“That all persons who served ninety days or more in the military or naval service of the United States during the late war of the rebellion, and who have been honorably discharged therefrom, * * *.”

Said law does not require that the soldier should have been mustered into the service. The enlistment was the act of joining or entering the service. Disqualification for active military service having been found after eight months had elapsed, the soldier was honorably relieved from his engagement entered into when he signed the enlistment paper. As shown by the record this soldier was in the military service long enough to come within the purview of the pension law of June 27, 1890, and therefore the rejection of his claim on the ground stated is overruled.

In the case of William N. Davis (7 P. D., 333), the records of the War Department show that the soldier was enrolled, as a substitute, October 20, 1864, and discharged on a surgeon's certificate of disability May 3, 1865. The said certificate of disability shows that the soldier was disabled by reason of an accidental gunshot wound, and also by a fracture of the thumb received on November 8, 1864, not in line of duty.

The records of the Treasury Department showed that Davis had received pay from date of enlistment to date of discharge.

The records of the War Department also showed he was rejected by a draft rendezvous board of inspection, date and cause not stated, and discharged by order of commander of northern department.

The claim for pension was rejected on the ground that Davis was never mustered into the service, and in passing upon that question the Department said:

"Muster-in" is not necessary in military law to perfect or complete the legal entrance into the service of a soldier who has been formally enlisted therein. Winthrop, in his Military Law, page 760, says:

"The term 'muster-in,' though sometimes confounded with 'enlistment,' is only properly employed to designate the formal admission (upon inspection, administering of the oath, etc.), into the United States service of militia or other State troops, or troops raised under State authority."

This term is, strictly, without application to the Army proper, into which persons are admitted only by enlistment and separately. While muster-in may, therefore, be essential in some cases, to constitute a legal entrance into military service, it is not in cases like the present, and was so held by the Department in the case of Simon P. Chambers (vol. 6, P. D., p. 260), which is hereby affirmed.

Furthermore, this appellant does not appear to have been "rejected as a recruit." He was duly and regularly enlisted as a soldier, was paid as such, accorded hospital and furlough privileges as such, and as such was discharged by reason of a disability incurred in service, although, as stated, not in line of duty. It is manifest he was recognized by the Government's military authorities as being legally in the military service.

The words rejected as a recruit, used above in quotations, are manifestly intended to imply that the soldier was accepted and held to service, instead of being rejected at the threshold of his enlistment as a substitute, and they could therefore have no other significance when applied to the facts in the case at bar, and, besides, the entire paragraph in which they occur is mere dicta.

In the case now under consideration it appears from the records of the War Department alone that the soldier duly enlisted as a private of Company H, Tenth Virginia Volunteer Infantry (afterwards known as Tenth West Virginia Volunteer Infantry), June 13, 1862; that his name was regularly borne upon the rolls of said organization until December, 1862, and that he was subsequently given a certificate of honorable discharge, to date December 18, 1862, in which said certificate it is recited that the soldier was discharged "by reason of being a rejected recruit." The muster rolls show that he was present with his company during the entire period of his service, except that the roll of October 31, 1862, shows him "absent at time of muster without leave since October 25, 1862." The roll of December 31, 1862, contains the notation "rejected last muster."

The evidence obtained on special examination shows, and it is not elsewhere denied, that he rendered faithful service as such private soldier for more than six months, although the reported five days' absence without leave, in the latter part of October, 1862, is not explained in said testimony, nor was it mentioned to the witnesses by the special examiner.

In your report of November 5, 1903, you quote from the decision

rendered by the Department in the case of Thomas J. Morman, No. 49, current series, in support of the action of your Bureau in again approving for rejection the application for restoration. It is true that this Department decided in that case that it was the duty of the Bureau to "follow the records of the War Department in cases where such records show the fact of enlistment and discharge," and that if said record be erroneous application should be made to the War Department to change it, but it is not clearly perceived how that decision could be properly applied adversely to the claimant's interest in the case at bar. When the pension was granted said records did show, and this Department is not yet advised that they do not still show, the soldier's enlistment and honorable discharge. It is true that the certificate of discharge was not issued until 1887, but it is none less a fact of record in the War Department that such certificate was issued by an official whose duty it is to issue such certificates, and, in view of the undisputed history of this soldier's enlistment and faithful military service, the action appears to have been a most commendable one, and, as hereinbefore suggested, that official probably had all the important facts before him when said action was taken.

In your report of November 5, 1903, you further say:

The final holding of the War Department in the case in hand is that this soldier or claimant was never discharged, inasmuch as he was never in the service of the United States.

This suggestion doubtless refers to the opinion of the Chief of the Record and Pension Office of the War Department, hereinbefore set out at length, and which was furnished in response to a request of the Bureau for a complete report of everything of record concerning the soldier's military history.

In the case of Jefferson M. Human (12 P. D., 500) this Department held as follows:

A lawful administration of the pension laws is impossible without a knowledge of certain facts, many of them being of record, and of record only, in the archives of the War Department. It is to the last-named depository that this Department must look for a transcript of its records of facts, the same as do the other branches of the executive in matters pertaining to them. It is, however, for the Department of the Interior, in matters relating to pension, to draw its own conclusions from such facts. Such must be true from the very necessities of the case and under the law. Any opinion of the head of an executive department, so far as it may—collaterally even—have to do with the question before this Department, is entitled to and is given great weight. Nevertheless, when this Department has the facts before it in a pension claim it must, under the law, reach its own conclusions. It can not shift the burden or divide the responsibility by accepting, against its own judgment and conscience, the conclusion of another department upon a question wholly incumbent upon this Department to decide. (See opinion in the case of David H. Dyer, 9 P. D., 87.)

No view or instruction is contained in the decision in the Thomas J. Moorman case that would modify or anywise affect the Department's opinion as expressed in the case of Jefferson M. Human, but,

on the contrary, the two decisions are in entire harmony, and the doctrine enunciated in both would aptly apply in support of claimant's contention in the case at bar.

It may be that every important fact of record in the War Department has not yet been furnished in response to repeated requests of the Bureau in that behalf, but from a very careful consideration of all the facts and circumstances of this case, as disclosed by the evidence on file, the Department is of opinion that the pensioner's name was improperly dropped and, therefore, said action is hereby reversed.

FEE—RENEWAL OF PENSION—INCREASE.

ISAAC WALKER (CLAIMANT).
CYRUS E. PERKINS (ATTORNEY).

A fee in excess of \$2 can not be certified to an attorney for his service in securing renewal of pension under the act of June 27, 1890, from date of holding medical examination, at a higher rate than was formerly allowed to the claimant under said act, the necessary service constituting but a claim for increase under the act of June 27, 1890.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
November 19, 1903.*

Cyrus E. Perkins, of Grand Rapids, Mich, on September 25, 1903, entered an appeal from the action of the Bureau in the matter of fee on the issue of June 15, 1903, in the claim for pension under the act of June 27, 1890, of Isaac Walker, who served in Company M, Ninth Missouri State Militia Volunteer Cavalry.

Certificate issued January 30, 1892, in the claim of the soldier under the general law to allow him pension at \$4 per month, and this rate was increased to \$6 per month from March 1, 1895 (date of act of Congress), on account of disability due to urinary troubles.

There was filed in behalf of the soldier July 14, 1890, a claim for pension under the act of June 27, 1890, from which date certificate issued September 1, 1897, to allow the rate of \$6 per month under said act to March 1, 1895, from which date the rate of \$6 per month under the general law had been allowed.

The soldier was in receipt of pension under the general law at the rate of \$6 per month, when in his behalf, on August 22, 1902, the appellant filed a declaration for renewal and increase of pension under the act of June 27, 1890, which contained a power of attorney in his favor. A medical examination was held January 7, 1903, from which date certificate issued June 15, 1903, to allow the rate of \$8 per month under said act. A fee of \$2 was certified to Mr. Perkins for securing the pension allowed. He contends that the claim allowed was original pension under the act of June 27, 1890, and, therefore, a fee of \$10 should be paid to him; hence this appeal.

In this case the brief face shows that "renewal of pension under the act of June 27, 1890," has been allowed. It imports that payment of pension under said act, which had been suspended for some purpose of benefit to the claimant, has been continued and the claimant's name restored to the roll under the act of June 27, 1890, so that further payments of pension can be made under said act. Claims for renewal of pension under the act of June 27, 1890, where the applicant's title to pension under the provisions of said act is not in issue, are not original claims for pension in any sense of the term as used in pension parlance, but are a class of claims for increase under the act of June 27, 1890. (Andrew B. Cleveland, 12 P. D., 17.)

Also the brief face shows that from the date of holding a medical examination in the claim a rate of pension has been allowed under the act of June 27, 1890, in excess of the rate formerly received by the claimant under said act. The pension secured by the proceedings instituted in behalf of the claimant under the act of June 27, 1890, is increase of pension under the provisions of said act. (Andrew B. Cleveland, *supra*.)

For services for securing increase of pension under the act of June 27, 1890, in a claim filed subsequently to March 9, 1891, a fee in excess of \$2 can not be paid. (John H. Afflerbach, 11 P. D., 508.) Accordingly the action of the Bureau in refusing to certify a fee in excess of \$2 to the appellant for his service in the present claim is affirmed.

SERVICE—ACT JUNE 27, 1890—ABSENCE.

MARY DASHER (WIDOW).

1. Where various reports of the War Department as to a soldier's service are conflicting or incomplete, a construction unfavorable to a claimant should not be placed upon such reports if, with an equal show of reason, they are susceptible of a construction favorable to claimant's interests.
2. In determining the length and character of service rendered, within the meaning of the act of June 27, 1890, absence with leave should not be deducted unless it appears that the purpose of such leave was incompatible with the rendition of actual service.
3. Where the record shows absence with leave, and the evidence does not indicate that during that period soldier was attending to his private business or devoting the time to his personal pleasure, the presumption attaches that the leave was granted for purposes consistent with the rendering of actual service within the meaning of the act of June 27, 1890.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, November 23, 1903.

Mary Dasher, widow of Augustus Dasher, Company C, Forty-fifth Illinois Volunteer Infantry, is the appellant in this case. Her husband, the soldier, died July 30, 1890. He was not a pensioner; in fact, he never applied for one.

On August 18, 1890, the widow applied for pension under the act of June 27, 1890 (No. 466529). The claim was rejected July 11, 1899, on the following stated ground:

No title, as the report of the War Department fails to show that the soldier ever joined his company and regiment. The act of June 27, 1890, requires that the soldier must have served ninety days during the war of the rebellion to give title to the claimant.

This action was based upon the following reports furnished the Bureau of Pensions by the Chief of the Record and Pension Office of the War Department:

* * * June 24, 1891. * * *

The rolls show that Augustaco Dasher, mentioned in the preceding endorsement, was enrolled September 8, 1864, and mustered out May 18, 1865.

This was supplemented by the following report under date of January 15, 1894:

Augustace Dasher, Co. C, 45 Regt. Ills. Inf., was enrolled Sept. 8, 1864, and mustered out ———, 186—.

From enr., 186—, to ———, 186—, he held the rank of pvt., and during that period the roll show him present except as follows: Dec. 31, 1864, not yet reported to co.; Feb. 28, 1865, presence or absence not stated; April 30, 1865, absent with leave since Nov. 1, 1864. Name borne on rolls also as August Dasher, Augustes Dasher, Augustus Dasher, Augustice Dasher, but not Augustaco.

The medical records show him treated as follows: No record found.

It has this day (Jan. 15, 1894) been determined by this Department from evidence received from the 2nd Auditor of the Treasury that this man was mustered out with detachment June 3, 1865, and paid to include that date a private.

On June 27, 1899, the War Department was asked to furnish the following information:

The within-named soldier appears to have been drafted or a substitute recruit. Please give the date on which he actually reported to his company for duty, and from which he is considered by your Department as having been in the military service. For whom was he a substitute? An examination of the company morning and other reports is desired for the purpose of ascertaining his presence or absence during each month. Please give personal description.

In reply thereto, under date of June 29, 1899, the following report was transmitted:

Respectfully returned to the Commissioner of Pensions with the information that August Dasher, Co. C, 45th Ill. Inf., was a substitute for John L. Norton. Per dis.: Born Switzerland, age 18 years, occupation laborer, eyes hazel, hair dark, comp. dark, height 5 ft. 6 in.

Nothing has been found of record in the office to show that he ever joined the co. and regt. He was accepted in the military service of the U. S. by the board of enrollment, 6th dist. of Ill., Sept. 8, 1864.

Attached to the face brief was the following decision of the Commissioner of Pensions under date of July 5, 1899:

Your attention is invited to the statement in the report of the War Department under date of June 23, 1899, in regard to actual service performed by soldier, to the

effect that "nothing has been found of record in this office to show that he ever joined his company and regiment." The act of June 27, 1890, requires that the soldier must have served ninety days during the war of the rebellion in order to give title thereunder to the widow. (See Vol. 9, P. D., p. 162.) As it is not shown that this soldier served ninety days the widow's claim will be rejected.

It was in this form and with the evidence above given that the case came to this Department on appeal March 13, 1902.

The attitude of the Commissioner of Pensions was more fully explained in a letter written by your predecessor on January 2, 1902, to the Hon. Frank M. Eddy, Member of Congress, who was interested in the case:

I have the honor to acknowledge the receipt of your recent inquiry relative to the claim No. 466529, of Mrs. Mary Duscher, of Redwood Falls, Minn., widow of August Duscher, late private Company C, Forty-fifth Illinois Infantry, and to advise you that her claim under the act of June 27, 1890, was rejected in July, 1899, upon the ground that her husband did not serve ninety days as required by the provisions of the act of June 27, 1890, to give title to pension thereunder.

It appears from the reports of the War Department submitted to this Bureau that the claimant's husband was enrolled September 8, 1864, and was discharged June 3, 1865. The Bureau is advised by the War Department that nothing has been found of record in that office to show that the soldier ever joined the company and regiment to which he was assigned, and that the rolls for April 30, 1865, show him absent, with leave, since November 1, 1864. It will therefore be seen that he was absent with leave during the months of November, December, January, February, March, and April. It can not be determined from the reports of the War Department furnished this Bureau whether the soldier's leave expired May 1, 1865, or whether he performed any military duty at any time. The War Department appears to have been unable to determine the date of his discharge until 1894, when such date was fixed upon evidence received from the Treasury Department. It does appear clear, however, that the soldier was not performing active service during the months of November, December, January, February, March, and April, as above indicated.

In the case of John R. Trout, the honorable Secretary of the Interior, under date of June 29, 1901, held as follows:

"It is believed that the act of June 27, 1890, contemplates an actual service of at least ninety days in the sense that the soldier or sailor beneficiary must have been for that length of time either performing military duty, or in hospital, or on sick furlough, or held as a prisoner by the enemy. The language of the act is 'All persons who served ninety days or more,' etc. It would seem to be unnecessary to argue that a man voluntarily absent from his command without leave or with leave, for the purposes of his own business or pleasure, was not serving during the time of such absence."

Inasmuch as it has not been shown that the soldier in this case served ninety days or more, either by performing military duty during that length of time, or that he was in hospital or on sick furlough, or held as a prisoner by the enemy for that length of time, and as the act of June 27, 1890, does not confer pensionable rights upon those who were "in the service" ninety days, but upon those who served ninety days or more during the war of the rebellion, and the word "serve" as used in said act is held to indicate the performance of active military or naval duties on the part of the soldier or sailor, the rejection of the widow's claim is believed to have been proper, and no good reason is shown why the same should be disturbed.

But under date of December 4, 1901, this Member of Congress received another communication, which is as follows:

HON. FRANK M. EDDY, *House of Representatives.*

SIR: Referring to your letter of the 2d instant, received to-day, in which you request to be furnished with a statement of such information as may be afforded by the records of this Department in relation to the service of August Dasher, as of Company C, Forty-fifth Illinois Infantry, and in which you state that the pension claim of the widow of the soldier has been rejected on the ground that the soldier was never with his company during his service, and that you have in your possession his discharge certificate, which shows that Augustace Dasher, a private in Company C, Forty-fifth Illinois Veteran Volunteer Infantry, was enrolled on the 8th day of September, 1864, and was discharged on the 3d day of June, 1865, at Washington, D. C., by telegram from War Department May 18, 1865, I have the honor to inform you that it is shown by the records that August Dasher was enlisted September 8, 1864, and accepted into service on the same date, as a substitute, to serve one year. He arrived at Camp Butler, Illinois, September 9, 1864, and was assigned to the Forty-fifth Illinois Infantry Volunteers, to which regiment he was sent September 22, 1864. He arrived at Exchange Barracks, Nashville, Tenn., September 26, 1864, and he was discharged from the service, under the name Augustus Dasher, as of Company C, Forty-fifth Illinois Infantry Volunteers (to which company he had been assigned) June 3, 1865, at Washington, D. C., pursuant to War Department telegram of May 18, 1865.

Very respectfully,

F. C. AINSWORTH,
Chief Record and Pension Office.

The discharge certificate, to which reference was made in the foregoing letter, is as follows:

To all whom it may concern:

Know ye that Augustace Dasher, a private of Captain ——— Company (C), 45th Regiment of Illinois Vet. Vol. Infantry Volunteers, who was enrolled on the eighth day of September, one thousand eight hundred and sixty-four, to serve one year or during the war, is hereby discharged from the service of the United States this 3d day of June, 1865, at Washington, D. C., by reason of under provision telegram from War Department May 18, 1865. (No objection to his being re-enlisted is known to exist.) *

*This sentence will be erased should there be anything in the conduct or physical condition of the soldier rendering him unfit for the Army.

A. W. McLANE,
1st Lt., Comdg. the Company.

Said Augustace Dasher was born in ———, in the State of Switzerland; is 18 years of age, 5 feet 6 inches high, dark complexion, hazel eyes, dark hair, and by occupation, when enrolled, a laborer.

Given at Washington this third day of June, 1865.

AUG. P. NOYES,
*1st. Lieut. 16th Wis. Inf. Vol. & A. C. M. 3rd Div. 17 A. C.,
Commanding the Regiment.*

I have compared the above with the original discharge and certify that it is an exact copy thereof.

J. T. McCLEARY, M. C.,
2nd Dist. Minn.

MANKATO, MINN., Nov. 6, 1899.

This letter from the Chief of the Record and Pension Office is an official statement of facts duly made by one officer of this Government to another officer, and, as such, is entitled to as much weight as if it had been addressed to the Commissioner of Pensions. The report purports to be based upon the same official records whence these other reports proceed, albeit they are diametrically opposed to each other upon points material to the present issue.

Under date of December 31, 1902, this Department returned the papers to you, inviting your attention to this correspondence and stating:

If the communication from the War Department to the Congressman is a true statement of what the records show now, former reports which formed the basis of the action of rejection, were not true in detail.

Under date of January 8, 1903, you transmitted the reports and the correspondence to the Chief of the Record and Pension Office, asking if in view of this letter the former reports were correct. To this inquiry the Chief of said Office replied, February 14, 1903:

Nothing has been found of record to warrant any change in the attached statements of this office, dated January 15, 1894, and June 29, 1899, referred to within.

Nothing has been found of record to show the whereabouts of the soldier named within between September 26, 1864, and the date of his discharge.

Upon what, then, was his statement to the Congressman based when he wrote the latter:

He arrived at Camp Butler, Illinois, September 9, 1864, and was assigned to the Forty-fifth Illinois Infantry Volunteers, to which regiment he was sent September 22, 1864. He arrived at Exchange Barracks, Nashville, Tenn., September 26, 1864, and he was discharged from the service under the name of Augustus Dasher, as of Company C, Forty-fifth Illinois Infantry Volunteers (to which company he had been assigned) June 3, 1865, at Washington, D. C., pursuant to War Department telegram of May 18, 1865.

If this is true, and is founded upon the records, how can it also be true that "nothing has been found of record in this office to show that he ever joined the company and regiment," according to the report of June 29, 1899?

The records of the War Department being so conflicting and unsatisfactory, this Department again returned the papers in the case to you, under date of February 24, 1903, directing you to make a call upon the Auditor for the War Department "for information obtainable from his records as to the length of service of the soldier and the time for which he was paid, giving the period covering which payment was made."

On April 25, 1903, this officer reported:

The records of this office show that he was paid for eight months and twenty-five days' service in above-named company, from September 8, 1864, to June 3, 1865.

You have now returned the papers to this Department with a new face brief, with this indorsement thereon:

Approved for rejection. Former action of rejection adhered to. There is no evidence that the soldier rendered any service; he was paid for the period from September 8 to June 3, 1865, but his whereabouts during that period is not shown.

As it was said in the departmental opinion of February 24, 1903:

The records of the War Department in this case are somewhat conflicting and unsatisfactory. It is a difficult matter, from the information at hand, to determine whether the soldier rendered service during the war of the rebellion for more than ninety days. The Department has never laid down a general rule in this class of cases.

It has, of course, been held that the service must be "actual service" to give the soldier, or those claiming under him, a pensionable status under the act of June 27, 1890. It has been held that time spent in desertion is to be deducted; absence without leave is not "actual service." It has also held that where one is absent with leave at his home to attend to his own business or his pleasure, the time so spent must be deducted. It has also held that where a man has been rejected and is furloughed to await discharge, he was not rendering actual service. But it has never held that where the records are conflicting and unsatisfactory the doubt should be resolved in favor of the Government. On the contrary, the benefit of doubt is to be given to the claimant. If this soldier was absent from his command from November to April, inclusive, it was "with leave." Why he was granted such leave the record does not show. One might "guess" that it was to attend to his business—he a laborer, 18 years old, and a substitute. It would be an equally good guess that he was home, or elsewhere, sick. But guessing in such weighty matters, important to the Government, gravely important to the applicant, is not permissible. The general presumption, from the fact of enlistment and discharge, coupled with the further fact that the soldier is paid for more than eight months of service, is that actual service was rendered. Such a presumption is to be overcome by adverse facts, but there are none in this case. His absence with leave is not incompatible with the rendition of actual service. The fact that the soldier was forwarded from his home in Illinois to join a regiment in Tennessee where he was assigned to a company, and for aught that appears to the contrary, was with his company until November 1; the fact that, so far as any record shows to the contrary, he returned to his company and was with it from April 30 to June 3, 1865, when he was duly discharged at Washington, D. C.; and the fact that he was paid for eight months and twenty-five days service, from September 8, 1864, to June 3, 1865, notwithstanding that it does not appear from one of these reports of the War Department that he was actually with the company for more than eighty-seven days: all of these facts, collectively, tend to show

that his absence with leave during the winter was on account of sickness, or for some other reason not inconsistent with the rendering of "actual service" within the meaning of the act of June 27, 1890.

Where various reports of the War Department as to a soldier's service are conflicting and incomplete, a construction unfavorable to a claimant should not be placed upon such reports if they may be construed, with an equal show of reason, in his favor. If, in this case, soldier's service was to be determined by his discharge certificate, or by the report made to Congressman Eddy, no question could arise as to this widow's title to a pension. And if the report of January 15, 1894, were the only report in the case, it shows more than ninety days actual service unless one reads into the record something that is not there, i. e., that his absence "with leave" was to enable him to attend to his private business or pleasure, and was not on account of sickness or something else incident to his service.

The case cited by the Commissioner of Pensions in his letter to the Hon. Frank Eddy is not in point. In that case (the case of John R. Trout, 11 P. D., 435) the evidence showed that the claimant went to his home, after having been with his command for a week or two, and remained there until his company was about to be mustered out, another man taking his place in the ranks and answering to his name at roll call. The evidence did not sustain soldier's claim that he was home ill, and that he was absent on sick furlough; in fact, the evidence disproved that claim.

In this case the evidence does not show that soldier was home when he was absent with leave. It is entirely silent as to his whereabouts and the purpose of or reason for his absence, if he was absent. Contrariwise, the report made to Congressman Eddy shows enlistment in Illinois, presence with his command in Tennessee three weeks later, and discharge in Washington, D. C., more than eight months later—with no absence whatever.

Neither is the case of Nancy Rathton (9 P. D., 162) cited by the Commissioner of Pensions in his decision of July 5, 1899, in point. In that case, the soldier was rejected by a board of inspectors and furloughed to await discharge. He was never assigned to any military organization. In the case at bar, soldier was enlisted, assigned to a military command, forwarded to his regiment, and remained with his regiment until discharged more than eight months later, excepting such time when he was absent with leave, according to one report. In short, there is no decision of this Department where the facts are parallel with those in this case; no decision by which this Department has held that where the Chief of the Record and Pension Office has made reports conflicting as to material facts, the report adverse by implication to claimant's interest shall be accepted to the exclusion of others.

The action of rejection is reversed and you will readjudicate this claim in accordance with this opinion.

AMPUTATION—ACT OF AUGUST 4, 1886—RATE.

HENRY M. CAPPER.

The claimant's leg having been amputated below the middle of the thigh bone, and hence not "so near the hip joint as to prevent the use of an artificial limb," he was not entitled to the rate of \$45 per month under the act of August 4, 1886.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, November 23, 1903.

The claimant, Henry M. Capper, late sergeant, Company G, Tenth Connecticut Volunteer Infantry, is a pensioner on account of loss of the right leg above the knee, for which he has received the following rates: \$8 per month from September 25, 1862; \$15 per month from June 6, 1866; \$24 per month from June 4, 1872; \$30 per month from March 3, 1883; \$36 per month from August 4, 1886; \$55 per month from March 2, 1903.

On April 18, 1902, he filed a claim for rerating, contending that he was entitled to \$45 per month from August 4, 1886, under the provisions of the act approved on that date, one of said provisions being as follows:

* * * And that all persons now on the pension rolls, and all persons hereafter granted a pension who in like manner shall have lost either an arm at the shoulder joint or a leg at the hip joint, or so near the joint as to prevent the use of an artificial limb, shall receive a pension at the rate of forty-five dollars per month.

Said claim for a rerating having been rejected by the Pension Bureau on July 10, 1902, an appeal was filed July 24, 1902.

The act of March 2, 1903, under which the claimant is now pensioned at \$55 per month, provides that that rate shall be paid to pensioners "who have lost an arm at the shoulder joint or a leg at the hip joint, or so near the shoulder or hip joint or where the same is in such condition as to prevent the use of an artificial limb."

It will be observed that whereas the act of August 4, 1886, made the allowance of the \$45 rate conditional upon the point of amputation, i. e., its being "so near the joint" as to prevent the use of an artificial limb, the act of March 2, 1903, establishing the \$55 rate provides that it may be allowed where some other condition than the proximity of the amputation to the joint prevents the use of an artificial limb, i. e., where the stump may be long enough, but its "condition" is such as to preclude the use of an artificial limb.

Bearing in mind this distinction between the two acts, we have only to inquire whether the point of amputation of the claimant's leg is so near the hip joint as to prevent him from using an artificial leg.

In the case of John W. Curran (5 P. D., 1), the Department held:

1. That in all claims pensionable under the act of August 4, 1886, for the loss of either an arm near the shoulder joint, or a leg near the hip joint, where the exami-

nation clearly shows the amputation has been at or above the middle of the arm bone, or at or above the middle of the thigh bone, it shall be considered as being *so near the joint as to prevent the use of an artificial limb.*

2. That the middle point of the bone shall be determined in the arm by carefully measuring from the margin of the acromion process, with the arms hanging down, to the end of fragment of bone, and comparing this with the measurement of the sound arm from the acromion process to the outer condyle of humerus; and in the leg, by measuring from the center of prominence of greater trochanter to end of fragment, and comparing this with measurement of sound leg from the above point to the prominence of outer condyle.

The reports of medical examinations in this case show that the amputation was made below the middle of the thigh bone. The report of the latest examination, which is the most definite on this point, states:

Right fragment from middle of greater trochanter to tip of bone, $9\frac{1}{2}$ inches; left leg from same point to external condyle of femur, $14\frac{1}{2}$ inches.

It is doubtless true that he could not use an artificial limb effectively, but this was owing to the sensitiveness of the stump and not to its shortness. Under the act of August 4, 1886, as construed by the Department, he was not entitled to \$45 per month, but only to the rate (\$36) provided for the loss of a leg above the knee.

No error appearing in the action of the Bureau, the same is affirmed.

MARRIAGE AND DIVORCE—CALIFORNIA—LIMITATION—NULLITY—DECREE.

BRIDGET SHAY (MOTHER).

Appellant's claim was rejected on the ground that her son, the sailor, left a widow surviving him, who is now a pensioner. Sailor was married to Lola B. Worth at Pasadena, Cal., March 7, 1898. She had previously been married, but her husband procured a divorce from her in Cook County, Ill., on November 20, 1897, three months and fifteen days prior to her marriage to sailor. An amendment to the California code, passed in 1901, provided that the subsequent marriage of any person during the lifetime of a former husband or wife is illegal and void from the beginning, unless—

1. "The former has been annulled or dissolved by a decree entered at least one year prior to such subsequent marriage.
2. Unless such former husband or wife was absent or was generally reputed * * * to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal."

Held: 1. That as it does not appear that the marriage referred to was ever annulled by a court of competent jurisdiction, the presumption is that sailor left a lawful wife surviving him.

2. That as the limitation prescribed by the California code was not enacted until after the marriage in question, the same has no application thereto.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
November 28, 1903.*

John Shay, jr., who was a plumber and fitter on the U. S. S. *Montgomery*, U. S. Navy, from July 8, 1895, to July 7, 1897, died on August 18, 1899.

On August 3, 1901, Bridget Shay, his mother, filed a declaration for pension under the provisions of the general law. Her claim was rejected on October 30, 1901, on the ground that she had no title to pension, since the sailor left a widow surviving him, who is now a pensioner.

Appeal was taken on January 25, 1902, resting upon the contention therein set forth as follows:

It is admitted by all concerned that the sailor was married to one Lila B. Worth at Pasadena, Cal., on March 7, 1898, and that he left her surviving him. This fact has been established by the evidence in the case, and it has also been established by a certified copy of the decree that the former husband (John Worth) of the alleged widow of sailor was divorced from her in Cook County, Ill., on November 20, 1897, just three months and fifteen days prior to her marriage to sailor. It is contended that the Department erred in rejecting the claim of the mother on the grounds alleged, for the reason that the statutes of California provide that the marriage of any divorced person within one year after their divorce shall be "void." It does not say "voidable" but "void," and this statute has been held valid by the courts of California. Therefore the marriage of Lila B. Worth to John J. Shay March 7, 1898, was, it seems to me, void in its inception and could not afterwards become valid except by a remarriage, which never took place.

The law referred to is laid down in the statutes and amendments to the codes of California, 1901, page 335, as follows:

SEC. 18. Section sixty-one of said code is hereby amended to read as follows:

61. A subsequent marriage contracted by any person during the life of a former husband or wife of such person with any person other than such former husband or wife is illegal and void from the beginning, unless—

1. The former marriage has been annulled or dissolved by a decree entered at least one year prior to such subsequent marriage;

2. Unless such former husband or wife was absent and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted;

In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

It does not appear from the record in this case that the marriage referred to has ever been adjudged a nullity by a court of competent jurisdiction. That being true, the presumption is that the sailor left a lawful wife surviving him, and who is now a pensioner.

It may also be true that the former husband, Worth, was dead at the time of the sailor's marriage to Lila B. Worth. In that event the marriage would have been valid from its inception. The record appears to be silent on that question.

It also appears that the one-year limitation placed by the law of California upon divorced parties was not enacted until 1901. It therefore has no application in determining the legality of the marriage of the sailor in 1898. A very pertinent question might arise as to whether that law in its present form would have any application in a case where a divorce had been granted in another State, and between citizens of another State, one of whom subsequently moved into California and married within less than a year after the date of such divorce, but it is not necessary to pass upon that question in this case.

The action complained of is hereby affirmed.

DEPENDENT PARENTS—SECTION 4707, REVISED STATUTES—MEANS OF SUPPORT—EVIDENCE.

CORA GEE, NOW STOLWORTH (MOTHER).

A mother who has a healthy husband 29 years old, who earns, when he works, from \$1.50 to \$2 per day, and a son 16 years old, whose earnings she is entitled to, is not dependent within the meaning of section 4707 of the Revised Statutes. It was not the intention of Congress to pension the mother of a soldier if she has an able-bodied husband who lives with her and is shown to be able to support her, although he may not be able to provide luxuries.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, November 28, 1903.

Cora Stolworth, as the mother of Marion Gee, who served as a private in Company F, Tenth U. S. Volunteer Cavalry, from March 29, 1899, to May 4, 1901, the date of his death in the service, filed her claim June 1, 1901, for a dependent mother's pension under the general law, as amended by the act of June 27, 1890, alleging that she was, in part, dependent upon soldier for support.

This claim was rejected on the ground of nondependence April 4, 1902, and then claimant filed additional evidence, but the Bureau adhered to its former action and refused to reopen the claim, from which action she appealed April 28, 1902.

This claim was before the Department on appeal September 19, 1903, on which date an opinion was rendered affirming the action of the Bureau.

This motion, filed September 30, 1903, is for a reconsideration of said departmental decision, and it is therein contended that the earnings of claimant's husband do not furnish her adequate means of support, and calling attention to the law of May 9, 1900, fixing \$250 a year as the minimum net annual income which shall preclude a widow from pension under the act of June 27, 1890, as then amended, and also the case of Sarah, mother of George Trimble, decided December 18, 1880 (7 P. D., o. s., 303), holding that a mother whose husband earns \$250 a year is without an adequate support.

There is no certain rule by which to determine the question of adequate support. What are adequate means of support must depend upon the condition of life and the surrounding circumstances of each particular case. The means of support in every case should be sufficient to maintain the mother in that condition of life in which she has lived.

In this case it appears that claimant and her husband are ordinary laboring people and work only about half of the time. The testimony shows that the husband is a young, healthy man, 29 years of age, and works on the docks in Mobile, Ala., for \$1.50 to \$2 per day, about three days per week. What he does the balance of the time, or whether he does or can do any other kind of work, is not shown. According to the testimony he earns no more than \$25 per month.

In determining the adequacy of claimant's means of support, the question is not as to the amount of money her husband earns, but rather as to his ability to furnish her an adequate support. He earns, when he chooses to work, from \$1.50 to \$2 per day, and there is no reason shown why he can not work every day. There are many different kinds of work that a laborer can perform, but if he prefers to confine himself to one particular class of work, that of loading ships three days a week, and thereby earns small wages, it is unfortunate for claimant, but it does not affect her pensionable status.

It is shown that claimant has a son 16 years of age, whose earnings she is entitled to, and undoubtedly receives, and this fact should be considered in arriving at the adequacy of her means of support. It is not shown how much this son earns, but whatever it is belongs to her.

Her husband evidently does furnish her with an adequate support, for it is not shown that she is in want for any of the necessities of life, or that any one not legally bound to do so contributes toward her support. Her husband earns, or at least is capable of earning, as much as the ordinary laboring man, and is able to support claimant in a manner suited to that condition of life in which she lives.

It was not the intention of Congress to pension the mother of a soldier if she has an able-bodied husband who lives with her, and is shown to be able to support her, although he may not be able to provide luxuries, as is shown in this case.

The question as to a mother's title is quite different from that as to a widow's title, under the act of May 9, 1900. The only question thereunder is whether or not claimant has a certain named income, without regard to its adequacy or inadequacy as a means of support. Under that act the sum of \$250 was arbitrarily fixed as the minimum net annual income which shall preclude a widow from pension under the act of June 27, 1890.

The argument of the attorney in this motion, based on the fact that Congress has fixed a certain sum which shall determine the pension-

able status of a widow under said act, has no force when applied to a mother's status, which is determinable as a question of judgment on all of the evidence in each particular case, from all the circumstances shown therein.

In the case of the mother of George Trimble (7 P. D., o. s., 303), cited by the appellant, the Department held that \$250 per year was not sufficient to furnish an adequate support for the claimant in that particular case. But that case is not in point, for, as before stated, the question of the adequacy of support is one that is to be determined under all the circumstances in each particular case. In the case referred to it was shown that claimant's husband earned only \$250 a year, but it was not shown that he was a young, able-bodied man, capable of earning much more than that amount, as is shown in the case under consideration.

After careful consideration of the evidence in the case, the Department can see no good reason for disturbing the action of the Bureau, and the former opinion, dated September 19, 1903, in which the action of rejection was affirmed, is adhered to. Motion overruled.

ATTORNEYS—RECOGNITION—PRACTICE—ELECTION.

JOHN KITE (CLAIMANT).

LEWIS HEININGER (ATTORNEY).

A claim under the act of June 27, 1890, which has been approved for admission and the issue of certificate is subject to the election of soldier to receive pension under said act, and, when he does not elect to receive pension thereunder, is the same as a rejected claim with respect to the rights of attorneys appearing therein and of those who subsequently file claims for pension under the act of June 27, 1890, in his behalf.

The action of the Bureau, therefore, in refusing to accord recognition to the appellant, he being the first to file a valid declaration and power of attorney subsequently to the admission of a claim in which the issue of certificate was subject to the election of the soldier to receive pension under the act of June 27, 1890, which he did not elect to receive, was error.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, November 28, 1903.

Lewis Heininger, of Washington, D. C., on August 15, 1903, entered an appeal from the action of the Bureau denying him recognition, in the claim for pension under the act of June 27, 1890, of John Kite, who served in Company D, Twelfth New Jersey Volunteer Infantry.

The soldier was in receipt of pension under the general law at the rate of \$6 per month, on account of disability due to gunshot wound of right arm, when, in his behalf, on June 4, 1896, Felix S. S. Johnson of Vineland, N. J., filed a declaration for pension under the act of June

27, 1890, which contained a power of attorney in his favor. The claim was rejected January 12, 1897, upon the ground of no ratable disability shown under said act and Mr. Johnson was so advised January 30, 1897.

February 7, 1900, in behalf of the soldier, Charles and William B. King, of Washington, D. C., filed a declaration for pension under the act of June 27, 1890, which contained a power of attorney in their favor. The claim was approved for admission May 15, 1902, to allow pension under said act at \$6 per month on account of partial inability to earn a support by manual labor from gunshot wound of right arm and disease of lungs, from February 7, 1900, date of filing declaration, the issue of certificate and payment of pension subject to the election of the claimant. Said attorneys were duly advised of this action May 21, 1902.

February 11, 1903, in behalf of the soldier the appellant filed another declaration for pension under the act of June 27, 1890, which contained a power of attorney in his favor. A medical examination was ordered May 14, 1903, through Charles and William B. King, and was held May 20, 1903. The appellant has been denied recognition, hence this appeal.

The appellant was denied recognition upon the ground that Charles and William B. King were entitled to one year from May 21, 1902, the date on which they were advised of the Bureau's action of May 15, 1902, in which to file the claimant's election to receive pension under the act of June 27, 1890, in the claim approved for admission on May 15, 1902; that the filing of a new declaration for pension under the act of June 27, 1890, in behalf of the claimant within the year, by whomsoever filed, was tantamount to an election on the part of the claimant to receive pension under said act pursuant to the action of the Bureau of May 15, 1902; that, as the appellant filed such declaration within the year to which Messrs. Charles and William B. King were entitled to file the election of the claimant to receive pension under said act, they and not the appellant are entitled to recognition.

The rule is that subsequently to the rejection of a claim for pension under the act of June 27, 1890, the attorney is entitled to recognition who first files a valid declaration for pension under said act and a valid power of attorney (Thomas Bean, 7 P. D., 527). It is not thought that any other rule should prevail under the conditions arising in this case. Unless the claimant elects to receive pension in a claim under the act of June 27, 1890, when admitted subject to his election to receive pension, the claim is the same as though it stood rejected, for all purposes with respect to any subsequent claim filed in his behalf as to the rights of the attorney who filed said claim. If the claimant does not elect, it is presumed that certificate would not issue to allow pension in the claim wherein the issue of certificate is subject to his election (see John H. Mavity, certificate No. 152141, vol. 446, P. L. Bk. 404). It is not thought that the filing of a new declaration for

pension in behalf of a claimant, under the act of June 27, 1890, subsequently to the approval for admission of a prior claim in his behalf under said act is an election on his part to receive pension under said act in the latter claim, whether or not said subsequent claim was filed within a year from the date of the approval for admission of the prior claim. If it were so considered it is manifest that nothing would remain to do except to issue certificate in accordance with his election thus expressed. It is also thought, under the conditions arising in the present case, that the appellant should be recognized under the practice as laid down in the Bean case, *supra*. Accordingly, the action of the Bureau is overruled.

DEPENDENT PARENTS—ABANDONMENT—CONTRIBUTIONS.

WILLIAM CONNELL.

Claimant, a criminal and crook, served in some prison from the time his son was 4 months old until his death; never saw or heard of him but once during that period; never contributed to his support, nor did said son, who was 21 years old when he died, ever acknowledge his obligation to, nor did he contribute to his father's support. He can not therefore be held to have been dependent on said son, whom he abandoned, for support within the meaning of the pension laws.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, November 28, 1903.

William Connell, father of Edward J. Connell, alias Ross, late private in Troop G, Sixth United States Cavalry, from January 7, 1898, to July 1, 1898, filed his claim for pension as the dependent parent of soldier, April 22, 1901, under section 4707, Revised Statutes, as amended by the act of June 27, 1890.

This claim was rejected July 16, 1903, on the ground of no parental recognition by claimant or soldier, and any prior or present dependence of claimant is due to his vicious habits and criminal life.

Claimant's attorneys appealed July 28, 1903, and the same has been made special.

The records of the War Department show that soldier was killed in action July 1, 1898, at Santiago de Cuba.

Claimant is now, and was at the time of the special examination of this claim, an inmate of St. Elizabeth Hospital for the Insane at Washington, D. C. According to his testimony he had not seen soldier but once since 1876, and then for only a few minutes. He never cared for or supported soldier, and evidently did not know of his whereabouts.

It appears that he has been convicted of and sentenced for crimes ranging from murder to larceny, and has spent all his time in jail

since 1876, except a year or two. He testified before the special examiner in part as follows:

I have been known under several different aliases, viz, John Lead, William H. Lee, John Lee, William Moran, and William Carnell. When I was first sent to States prison, in 1876, from Cumberland, Md., for seven years, I was sentenced under the name of William Connell.

I came out of Baltimore prison in 1883 to Washington, D. C., and was arrested September 2, 1883, on a charge of suspicion. I had to leave Washington and went to Cleveland. I had been there only two weeks when I was convicted of burglary and was sentenced to the Columbus State prison for nine years. I got out after serving six years and nine months for good behavior; came to Washington in fore part of 1891. I had been here only a short time when I was arrested for stealing another crook's watch. I gave bail, which I jumped. I went to Indianapolis, Ind.; cut a woman's throat, was arrested, and nothing was done. I went into the post-office afterwards to inquire for mail for William H. Lee, which name I had taken. when I was arrested and taken to Evansville, Ind., charged with burglary; tried and convicted, and sentenced to Jeffersonville State prison for four years; got out on good time in about three years and two months. This was in 1895.

As soon as liberated from Jeffersonville, in 1895, I went direct across the river to Louisville, Ky., where I killed a man; was arrested, tried, and sentenced to Frankfort, Ky., State prison for two years, and was discharged in 1897. I went direct to Indianapolis; was arrested there on charge of burglary, which charge was dismissed, and I was set free.

I went from there to Memphis and was arrested on suspicion of burglarizing a house, was confined for two weeks, when I was brought back to Washington, on the original charge of jumping my bail in 1891, and was kept in jail for several months. This must have been in the year 1898.

I did not see or hear from my son, the soldier, during the year 1898; in fact, I never saw him but once from the time I was first sentenced to State prison in 1876, when he was a babe in his mother's arms.

I again reiterate that I never in my whole life received a letter from my son, the soldier, nor he never gave me anything or contributed to my support, as I was in State prison ever since he was 4 months old until he died.

It is shown that soon after claimant was first sent to the penitentiary in Baltimore in 1876, his wife deserted the soldier, who was then less than a year old and he was taken care of and reared by his grandparents. Soldier's mother died in 1883, in a house of ill fame in Washington.

It appears that soldier's father, the claimant, has not cared or provided for the soldier, and has not even seen him since he was a child a few months old.

According to the admissions of claimant, which are in part corroborated, he is an habitual criminal, and has spent over twenty-five years in prison.

Claimant, perhaps, is the father of soldier, but under circumstances such as are detailed in this case, he is not entitled to pension as a dependent parent. Such pension is granted as compensation for the loss of support which the son furnished, or which it may be presumed he would have furnished if he had lived. In this case the facts disclosed absolutely destroy any presumption that the son, if alive,

would be under a legal or moral obligation to aid in his parent's support. He was over 21 years of age at the date of enlistment, and had been a stranger to claimant since early infancy, and his death did not deprive the latter of any actual or potential means of support.

The law never intended that a father should receive pension for the sole reason that he begot the soldier, and is now in necessitous circumstances in consequence of a career of vice and crime.

In the case of David Taylor (16 P. D., o. s., 246), where it appeared that the mother of the soldier had, prior to the breaking out of the rebellion, abandoned her husband and their children (including soldier) and that the father had the sole care and custody of the children after being abandoned by the mother and was dependent upon the soldier for support, the Department recognized the right of the father to pension, thereby denying any prior right on the part of the mother. The principle underlying that decision will apply to the case now under consideration.

The action appealed from is therefore affirmed.

ATTORNEYS—RECOGNITION—DEFAULT—MATERIAL SERVICE.

WILLIAM H. RHODES (CLAIMANT).

W. W. DUDLEY & Co. (ATTORNEYS).

Where an attorney has rendered no material service in a claim for more than one year and thereby becomes in default, the Bureau may properly refuse to accord him further recognition although the claimant has not appointed another attorney to continue the prosecution of the case.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
November 28, 1903.*

W. W. Dudley & Co., of Washington, D. C., on May 25, 1903, entered an appeal from the action of the Bureau denying them further recognition in the claim for additional pension under the general law, of William H. Rhodes, who served in Company D, Second Battalion, Eighteenth United States Infantry.

The soldier was in receipt of pension under the general law at the rate of \$12 per month on account of disability due to gunshot wound of both thighs, when, in his behalf, on July 19, 1890, W. W. Curry, of Washington, D. C., filed a declaration for additional pension on account of disability due to malarial poison and chronic diarrhea, which contained a power of attorney in his favor. He filed evidence on June 6, 1892, and was called upon January 18, 1893, for evidence of origin and continuance of alleged causes of disability. January 5, 1897, he transferred the claim to the appellants who, on September 17, 1897, filed the written consent of the claimant thereto. Appel-

lants filed September 27, 1897, articles of agreement stipulating for the payment of a fee of \$25. April 27, 1899, they were called upon for evidence of origin of diarrhea and continuance as to same and malarial poisoning. They filed January 18, 1900, the affidavit of Charles E. Law relative to origin of diarrhea and rheumatism in the service. The affidavit of this affiant relative to the origin and continuance of said causes of disability was filed June 6, 1892, by Mr. Curry, which was more definite than the affidavit filed by the appellants.

The appellants were entitled to recognition for one year from April 27, 1899, date of call of the Bureau. Within the year, viz, on January 18, 1900, they filed evidence, which, because it added nothing to the prosecution of the case, like evidence being already on file, did not comply with the call, nor prolong their rights. They became in default on April 27, 1900, or one year from the date of said call. Their neglect in this particular worked a forfeiture of their rights. As they have since rendered no material service they are still in neglect. They called up the case April 17, 1903.

On May 11, 1903, appellants were advised that—

The attached slip (call for status by appellants of April 17, 1903) is returned to you with the information that as no evidence has been filed for over three years in said claim, it will not be reviewed upon such call unless a new and valid power of attorney shall be filed.

The purport of this notice to appellants is that they can not be further recognized in the claim. As they are in neglect, action refusing to accord them further recognition was proper.

The appellants, who were the recognized attorneys in the claim, are in default through their failure to comply with a call of the Bureau for service. Although they have been in default for several years the claimant has not seen fit to appoint another attorney in lieu of the appellants to prosecute the case. Under these conditions the Bureau could continue to recognize the appellants as the attorneys of record. In the case of Olivia Joyce (7 P. D., 157) it is held (syllabus) that—

Where an attorney has rendered no service during the year to which he is entitled under rule 12, and there is no other attorney in the case, the Commissioner may, in his discretion, if the conditions of the claim demand it, continue to recognize the former attorney, thereby restoring to him his original rights.

In the case of Anna Derhammer, deceased, dated November 23, 1893 (16 Fee P. L. Bk., p. 362), a declaration in favor of the claimant was filed by the appellant attorneys on January 3, 1890; they filed evidence on March 24, 1891, which did not complete the claim, and thereafter rendered no material service. Upon the lapse of a year it was held by the Bureau that the appellants had forfeited their rights through their delay in the prosecution of the case for more than one year, during which they had failed to render any material service.

In deciding the question on appeal the Department said:

It does not appear that claimant has appointed an attorney to succeed appellants or that she desires to revoke their attorneyship; but her failure to appoint one or to express her dissatisfaction can not be accepted as evidence to show that appellants have not neglected their duty in the premises. Under rule 12 of the rules of practice before the Commissioner of Pensions, neglect to prosecute a claim for one year, in default of cause shown therefor, is held conclusive evidence of abandonment of a claim by an attorney, and undoubtedly such abandonment calls for affirmative action by the Bureau for the protection of the applicant. In the nature of things an applicant can have but little knowledge of the progress of her claim, and must necessarily rely upon the attorney. Where an attorney is, and has been long in neglect, it would be manifestly unjust to leave a claimant at such attorney's mercy, and thus postpone indefinitely the determination of rights which the latter was employed to establish.

The Department has invariably followed its rule laid down in the cited decisions, in all cases on appeal where the question as to an attorney's right to continued recognition was in the discretion of the Commissioner of Pensions under the test of said rule, and the attorney had been denied further recognition because he had neglected the case for more than one year.

The appellants for over four years have rendered no material service in the claim, although during that period they were advised of its status and thus knew what steps to take to complete it. Such neglect to prosecute a claim under the rules of practice works a forfeiture of an attorney's right. The action of the Bureau in denying the appellants further recognition is affirmed.

In this connection it is well to direct attention to the scope of the rule laid down in *Olivia Joyce*, as heretofore observed in the practice and as applied in this case, and to more particularly specify the precise conditions under which the rule has been invoked, so that a wider scope will not be claimed for the rule than has been heretofore given it.

When, through his failure to render material service in a claim within his allotted time, or to call it up at proper intervals, an attorney becomes in neglect under the rules of practice, and no other person has been appointed to prosecute the case, the attorney, although in neglect, can be recognized through the courtesy of the Bureau. Such recognition implies that, if not advised, or presumed to have been advised of the status of a claim, the Bureau will give him the status; if he then renders material service before another attorney appears in the claim, he will thereby be restored to his former rights and become the attorney of record in the claim. (*Moses Adams*, 26 Fee P. L. Bk., 228; *Charles Smith*, 28 Fee P. L. Bk., 419.) Also where an attorney filed, or appeared in a claim for pension, and more than a year elapsed between dates on which he rendered material service in its prosecution the rule has ever been that the performance of the service restored his status, provided the claimant had not appointed another attorney to continue its prosecution. Where in a case an attorney has thus

retrieved his forfeiture of attorneyship and continues to preserve his rights, the Bureau has given him status of the case in instances where he would have been so entitled had he never become in default. The furnishing of this status is what constitutes recognition by the Bureau through its courtesy. Its recognition to such an attorney has been denied in cases where the claimant has appointed another attorney to prosecute the case, not on the ground that either the former attorney or the claimant has abandoned the case, but, as stated in the cited cases, on the ground that the claimant has availed himself of the opportunity presented by the neglect of the one, to appoint another attorney to represent his interests.

When an attorney who has become in default in a claim does not subsequently render any material service in its further prosecution, there is no doubt as to the propriety of the Bureau in refusing to accord him recognition; but when in default he renders material service in a claim and no attorney has been appointed to supersede him, there are good reasons which can be assigned in favor of again according him recognition, and such act on the part of the Bureau would be in accord with its invariable practice in like instances in the past which has met with the approval of this Department. However, as the question as to an attorney's right to continued recognition upon rendering material service under the recited conditions does not arise in this case it will not be further discussed.

FEE-DISLOYALTY-ACT JULY 1, 1902-ATTORNEYS-RECOGNITION.

WILLIAM P. TAYLOR (CLAIMANT).

J. B. CRALLE & Co. (ATTORNEYS).

In claims for pension under the act of June 27, 1890, in which payment of pension has been barred by the provisions of section 4716, Revised Statutes, United States, where an attorney is the first, subsequently to the passage of the joint resolution of Congress of July 1, 1902, to cooperate with the claimant in the prosecution of a case in which he has been properly authorized so to do, such attorney may have title to the fee.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
November 28, 1903.*

J. B. Cralle & Co., of Washington, D. C., on August 7, 1903, entered an appeal from the action of the Bureau denying them a fee on the issue of July 14, 1903, in the claim for pension under the act of June 27, 1890, of William P. Taylor, who served in Company K, Third United States Volunteer Infantry.

In behalf of the soldier on August 19, 1890, George E. Lemon, of Washington, D. C., filed a declaration for pension under the act of

June 27, 1890, from which date certificate issued June 3, 1892, to allow pension under said act at \$12 per month on account of total inability to earn a support by manual labor from disease of lungs. On this issue a fee of \$10 was paid to Mr. Lemon. The soldier's name was dropped from the rolls pursuant to the action of the Bureau of July 19, 1895 (pension having been paid to August 4, 1895), on the ground that the soldier had aided and abetted the late rebellion against the authority of the United States.

Mr. Lemon, in behalf of the soldier, on November 22, 1895, filed a declaration for renewal of pension under the act of June 27, 1890. He filed evidence on May 14, June 18, July 27, and November 16, 1896. Mr. Lemon died December 18, 1896. His attorneyship rights were transferred to Stevens & Co., who, on August 31, 1897, filed evidence. They filed October 26, 1897, a new declaration in the claim.

The claim was rejected October 1, 1898, on the ground of soldier's disloyalty, and Messrs. Stevens & Co. were so advised October 20, 1898.

October 4, 1898, in behalf of the soldier, the appellants filed a declaration for restoration of pension under the act of June 27, 1890, from date of dropping, which contained a power of attorney in their favor. They filed evidence on December 19, 1898, January 10 and 28, 1899, and November 30, 1900, and calls for status on July 11 and November 25, 1902.

Messrs. Stevens & Co., in soldier's behalf, on March 21, 1903, filed a new declaration for pension under the act of June 27, 1890, which contained a power of attorney in their favor.

Certificate issued July 14, 1903, under the act of June 27, 1890, to restore pension under said act from August 4, 1895, date on which pension was paid at time of dropping, at \$10 per month for partial inability to earn a support by manual labor from disease of lungs. On this issue a fee of \$10 was paid to Messrs. Stevens & Co., hence this appeal.

When, on October 4, 1898, the appellants filed a declaration for pension under the act of June 27, 1890, in behalf of the soldier there was no authority in law for the payment of pension to him. Claims for pension in his behalf under said act were barred claims—barred by the provisions of section 4716, Revised Statutes. The filing thereof conferred no right upon an attorney, as he represented no interest of the claimant. In the present case the claimant had been advised before he employed the appellants that payment of pension could not be made to him under the provisions of the act of June 27, 1890. It was not necessary for the Bureau to proceed to adjudication upon every declaration for pension under the act of June 27, 1890, which he saw fit to file. After once having passed upon his claim for pension, and having informed him that payment of pension would not be made to him, there was no necessity for the Bureau to take any further action in the mat-

ter, regardless of how many declarations for pension he filed or how often he filed them or whom he employed to prosecute the claim. The filing of declarations served no purpose and conferred no rights upon an attorney who filed them. It is true that had an issue been raised as to whether this claimant voluntarily aided and abetted the late rebellion against the authority of the United States, then there would have been a purpose served by further prosecution. But such issue was not raised in this case—not even broached. That the claimant's service in the Confederate army was voluntary, as the records of the War Department show, was accepted as *sine qua non* in all proceedings instituted in behalf of the claimant. As the first claim in his behalf had been adversely adjudicated and he fully advised, it was not necessary to further notice proceedings in his behalf until an issue was raised in the case which necessitated further action. No such issue was raised. It was therefore proper for the Bureau not to take notice of new declarations for pension under the act of June 27, 1890, filed in the claimant's behalf, as its course was in this case, not even to brief them, but to do as it did with the declaration filed by the appellants, file it among the papers in the case, where it has remained. The authority of these appellants to prosecute in behalf of the soldier was given by him when his right to pension was barred, and, therefore, conferred no authority upon them until this bar was removed. It was removed by the passage of the joint resolution of Congress approved July 1, 1902. From that date in the present case the soldier was at liberty to contract with any attorney to secure for him his right to pension. This he could do in the usual manner—give some attorney power for the purpose. He gave such power to Messrs. Stevens & Co., to whom the fee was paid, and who were the first, subsequent to the passage of said resolution, with whom the claimant cooperated in the prosecution of the claim. There was no bar to their immediate recognition, and, as they were in good standing when the claim was allowed, they were entitled to the fee which was paid to them.

Had the claimant cooperated with the appellants in the prosecution of the claim subsequently to the passage of said joint resolution and prior to the appearance of Messrs. Stevens & Co. in the case there would be a different conclusion reached with respect to their title to a fee. But as there is nothing to show that, since the bar to payment of pension to the claimant has been removed, they have cooperated with the claimant in the prosecution of the case, and the claimant has seen fit to appoint other attorneys in the case, the action of the Bureau in refusing to certify a fee to the appellants is affirmed.

MARRIAGE AND DIVORCE—DECREE—JURISDICTION.

MELISSA BOYD (WIDOW).

A divorce decree which shows upon its face the necessary jurisdiction, the record showing the necessary jurisdictional facts, and such decree being valid and binding in the State in which it was rendered, will be regarded as conclusive by this Department in the administration of pension affairs, provided that no fraud was perpetrated upon the court, directly or indirectly, for the purpose of affecting the pensionable rights of any person.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
December 11, 1903.*

Melissa, as widow of Samuel A. S. Boyd, formerly a private in Company I. One hundred and forty-ninth Indiana Volunteer Infantry, filed her application under the act of May 9, 1900, on April 19, 1901, claim being rejected February 24, 1903, on the ground that she was not the widow of Boyd, inasmuch as the divorce she obtained from one Crandlemeyer, her first husband, was void on the ground of fraud. An appeal was filed June 19, 1903, reopening having been denied May 22, 1903.

The facts in the case are as follows: The claimant, on August 30, 1881, was granted a decree of divorce from her husband, Crandlemeyer, and she thereafter married the soldier, Boyd. During the special examination held under her claim for pension she tacitly admitted that she had not been a resident of the State of Missouri for a full year—a statutory necessity—next preceding the filing of her petition for divorce. She denies having made such a statement, but her evidence shows she did, and there is other fair proof to the effect that her tacit admissions were true.

There is but one question at issue, and that is as to the validity of the decree of divorce referred to, and a careful examination of the papers shows the decree to be regular in all respects, there being no want of jurisdiction upon its face, the record showing all necessary jurisdictional facts.

It may be stated, as a proposition of law, that if a decree upon its face shows a want of jurisdiction, such decree is unquestionably void; and it is undoubtedly true that where the record in the case shows certain facts, and the decree recites contrary facts, such a decree is often, though not always, held to be void, it being deemed under certain circumstances simply irregular. But when a decree shows full jurisdiction, and the record sustains the necessary jurisdictional facts recited in the decree, then such a decree is always considered valid and binding until overturned by a court of competent jurisdiction.

A marriage valid in the State in which it is contracted is a valid marriage everywhere, and as a general proposition a divorce decree valid in the State in which it is granted is also good so far as the domestic relation is concerned in every other State. Extraterritorial

jurisdictions frequently do not allow such a decree to disturb property rights when there is a conflict of law in the different jurisdictions, but in this particular class of decrees the question is largely one of comity between States, and there appears to be no invariable rule followed by the different States, nor by any particular State, a single State often varying its own rule according as the particular facts or equities in a given case demand. Such procedure appears to be a necessity so long as the laws of the different States are so widely at variance as to the causes for which divorces are granted, for otherwise persons with a lawfully determined status in one State would often be found to have an illegal status should they change their domicile to another State.

It may be argued that the Department of the Interior, by virtue of the quasi-judicial powers inherent in the office of the Secretary, has the right to decide as to the validity of a decree of divorce, and if, in its judgment, the decree is not valid by reason of certain facts shown in a pension claim pending, not in evidence in the original suit, that it has the right and jurisdiction to render a decision virtually annulling such a decree.

Whether such be true or not, as a legal technical proposition, matters little as to the principle involved. Certain it is, if it should decide that a divorce decree which recited necessary facts, and which was rendered by a court of competent jurisdiction, was void, such decision would have absolutely no judicial force, per se, outside this Department. No court, either State or Federal, nor any other department of this Government, would be bound to respect it. This Department is executive in its nature; its quasi-judicial powers, so far as pensions are concerned, are derived wholly from the necessities of the case—of determining who are entitled to pensions, and it will not arrogate to itself the full powers of the judiciary. The Department has to do with the status of parties in every State in the Union, and it will, so far as is possible, without violating the express terms of the act of August 7, 1882, which makes the *lex loci* the criterion, follow a uniform rule as to divorce decrees, and not allow claimants to be prejudiced or gain advantage, by reason of their respective domiciles. When, however, it is evident that fraud had been perpetrated upon the Government for the purpose of obtaining a pension, the validity of a divorce decree being then at issue, this Department would be bound to protect the Government against such fraud.

The Department announces that it will hold a decree of divorce conclusive, in the administration of pension affairs, when such decree shows upon its face necessary jurisdiction, and the record recites the jurisdictional facts on which such decree was based, reserving to itself, however, the right to inquire into any and all facts which may show or tend to show that fraud was perpetrated upon the court by any party to the decree for the purpose, directly or indirectly, of affecting

pensionable rights. And this it does, not by virtue of any express statute, nor by any rule of law, invariably followed by appellate courts, although a goodly number of precedents for such procedure could be cited; but upon the broad ground of public policy, in that in the administration of the pension laws the ends of justice may not be defeated, nor this Department made a forum for retrying divorce cases in which all parties have had their day in court and their status fixed by courts having jurisdiction over their domestic relations.

If, in rare and isolated cases, some hardship may result for the time being, it will be only for the time being; for such hardship may be generally overcome by the interested parties instituting proceedings in the forum where the decree was rendered, or in some court possessed with full judicial power to render an effective judgment which this Department would be bound, in good conscience, to respect. The Secretary of the Interior is an executive officer; his Department is not a strictly judicial forum, and he will not assume the responsibility of overturning a decree of court, valid upon its face, and good in the State in which it was rendered, unless it is plainly evident that fraud has been perpetrated against the United States Government.

In the within case the decree is regular in all respects, all necessary jurisdiction and jurisdictional facts are shown in the decree and upon the record; the decree is undoubtedly valid in the State in which it was rendered, and as there is no evidence of fraud attempted against the pensionable rights of any person the Department accepts such decree as conclusive.

Action reversed.

DEPENDENCE—WIDOWS—ACT OF JUNE 27, 1890, AND MAY 9, 1900.

NETTIE C. LUTES (WIDOW).

The evidence shows that the claimant owns property which does, or should, if prudently managed, yield a net income exceeding \$250 per annum. *Held:* That she is not entitled to pension under the above-named acts.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
December 18, 1903.*

Nettie C. Lutes filed, on July 6, 1900, a claim for pension under the act of June 27, 1890, as the widow of the late Nelson B. Lutes, formerly a soldier in Company D, One Hundred and Eighty-eighth Pennsylvania Infantry. Her claim was rejected in October, 1902, on the ground that she was in possession of resources amply sufficient, if providently managed, to produce an annual income of over \$250. From that action an appeal was taken November 8, 1902.

In the appeal the word "providently" in the statement of the ground of rejection appears as "providentially." If so written in the letter of rejection it was a clerical error.

The contention of the appellant is that she has not an "actual net income" in excess of \$250 per year.

In a sworn statement as to her financial resources and liabilities, filed on May 27, 1902, she estimates her annual income from property in her possession at \$260, and her necessary expenses for taxes, insurance, and repairs at \$328.37. According to this she is worse off than if she had no property at all, and would much improve her condition by giving it away. A careful analysis of her figures, however, shows some facts that she has apparently overlooked.

In the first place it appears that she owns the nouse in which she lives, and while she places in the column of her expenses the cost of taxes, insurance, and repairs on said house, she does not set against these expenses the rental value of the property. Income is not necessarily money. It may take the form of grain, or live stock, or food, or clothing; in short, it may be anything that is convertible into money or that supplies the manifold wants of man. A house to live in is as much "income" as food to eat or clothing to wear, or money with which to purchase or hire such necessities.

The assessed value of the appellant's home is \$1,440, which, according to her statement, is 40 per cent of its actual value. Its actual value is, therefore, \$3,600. Its rental value is not stated, but another house owned by her, worth \$2,700, rents for \$216 per annum. It would seem to be reasonable to presume that the more valuable property would rent for \$275 per annum, and this amount added to the appellant's "income" column brings up the total to \$535, or \$206.63 more than her expenses.

In the next place she places among her expenses an annual tax of \$5.88 on personal property (including office furniture and library valued at \$1,100) and \$8.80 for insurance on the same, but allows nothing on the other side of the account for the use of such property. This is manifestly unfair.

Again, there is charged in the expense account for 1900 \$57.38 for street paving and \$12 for laying a sidewalk. These are permanent improvements, which will endure for a long time, and their cost should properly be distributed over the whole of that time, and not charged up wholly to the year or years in which they were paid for.

According to the claimant's statement she is the absolute owner of the following property, none of which is encumbered:

	Value.
The house in which she lives.....	\$3,600
A double house, rented.....	2,700
A single frame house, rented.....	500
Two vacant lots.....	400
Eighty acres of farm land in Michigan.....	1,000
The undivided two-thirds of 55 acres in Pennsylvania.....	300
Office furniture and library.....	1,100
Note secured by mortgage.....	100
Total.....	9,700

If this property were converted into money and the proceeds properly invested it would, in all probability, yield a net income in excess of \$250 per annum. As the Department said in the case of Harriet D. Howard (13 P. D., 448)—

A claimant is chargeable with fair and reasonable results from income-producing property. She is called upon to use her money or property in such a way as to produce an income such as would naturally rise from a prudent use of it, and if her actual net income is then below \$250 she is pensionable, otherwise not.

This claimant may be managing her property in a way that best conserves her interest; being a lawyer, she doubtless is. If so, she is certainly deriving from it a net income exceeding \$250 per annum—not in money, perhaps, but in forms more satisfactory to her, such as the possession of a comfortable home, increase in the value of her property, and the use of articles needed in the practice of her profession. The Department is clearly of the opinion that she does not come within the class of widows for whose benefit the acts of June 27, 1890, and May 9, 1900, were passed.

The action of the Bureau is affirmed.

DISCHARGE WITHOUT HONOR—DISHONORABLE DISCHARGE.

JOHN H. RICKETTS.

This soldier having been discharged from service under special order mustering out his organization because of its refusal to obey orders, and such discharge being held by the War Department to be a discharge without honor, he was not honorably discharged from such service, and is not pensionable under the act of June 27, 1890.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, January 13, 1904.

This appellant, John H. Ricketts, was a member of Company A, First Eastern Shore Maryland Infantry, from September 21, 1861, to August 16, 1862, and in June, 1898, was allowed pension, certificate No. 964842, under the act of June 27, 1890; but in January, 1902, he was dropped from the rolls on the ground that he was not honorably discharged from said service—a report from the War Department of March 3, 1900, showing the organization was mustered out in accordance with special instructions for refusing to obey orders, which was held by that Department on January 4, 1896, to be a discharge of the members thereof without honor.

In an appeal filed June 1, 1903, it is contended that the order which was refused obedience by this organization was to go beyond the State; that this was an unlawful order, as the organization was one for home defense only, and that, therefore, such refusal was not a breach

of duty or of their contract, and should not be held or considered as rendering their discharge dishonorable, discharges being, it is contended, either honorable or dishonorable; and it is contended specially that Congress has passed upon the merits of this service by granting to the widow of Harrison T. Winterbottom, of said organization, a pension by special act, and "it is clearly unjust to remaining members to bar them."

While it may be unjust to pension one member and not another of this organization, the injustice is not on the part of this Department.

Pensions are granted by the laws of Congress alone, and the fact that Congress by special act (approved March 3, 1903) granted the pension to the widow of said Winterbottom shows that she was not pensionable under the general laws, else such act would not have been necessary.

As held in numerous decisions of the Department, a discharge which is honorable is a prerequisite condition of title to pension under the act of June 27, 1890, and a discharge given under such circumstances as existed in this case, because of a refusal of the organization to obey orders, can not be held or considered to have been an honorable discharge.

In the case of Matilda C. Tunison (11 P. D., 440), the Department stated:

Relative to the contention in regard to the rejection of the widow's claim under the act of June 27, 1890, it need only be said that, inasmuch as the War Department, which has sole jurisdiction in such matters, has decided that the soldier's discharge from the 20th Illinois Infantry, November 16, 1862, "for wilful neglect of duty and violation of orders is not regarded as an honorable discharge," such contention is wholly untenable. (See also Mary E. Walker, 7 P. D., 197; Elsie Hummel, 9 P. D., 311.)

The contention is made herein, however, that the individual discharges of the members of this organization should not be considered as tainted by the organization's refusal to obey the alleged order, so as to make such discharges not honorable discharges, because such refusal was on the part of the officers, only, of said organization, and the members thereof were bound to obey such officers.

This contention is not supported by the evidence. The record shows the muster out of the organization was because of its refusal, and not that of its officers alone or of its members alone. It seems probable that were the refusal that of the officers only, and the members were not themselves disobedient to the order, such officers would have been removed and others appointed, and the organization held in the service. The presumption from the record, if not, indeed, such be its direct force, is that the members and all of the organization were in disobedience of a lawful order, and were discharged in consequence. The lawfulness or unlawfulness of such order, or the character of claimant's discharge as one without honor, may not be questioned by

this Department. All such questions are for the War Department alone to decide. (See Matilda C. Tunison, *supra*; Jefferson M. Human, 12 P. D., 500.)

This claimant not having an honorable discharge from his service during the war of the rebellion was not and is not pensionable under the act of June 27, 1890.

The action appealed from is, therefore, affirmed.

INCREASE—ACT JANUARY 5, 1897—GRAY'S BATTALION.

JASPER N. ARMSTRONG.

As claimant was not lawfully on the rolls at the time the act of January 5, 1893, was passed, he was not entitled to increase under its provisions.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, January 15, 1904.

Jasper N. Armstrong, who served during the war with Mexico as a private in Company A, Gray's Battalion of Arkansas Volunteers, filed on June 2, 1887, an application for pension under the provisions of the act of January 29, 1887, alleging that he enlisted at Fort Smith, Ark., on May 5, 1846, and was honorably discharged at Fort Gibson, Cherokee Nation, on the 15th of March or April, 1847; that he enlisted to serve during the war with Mexico, and while en route to Mexico was, with his company, ordered to Fort Smith and Fort Gibson to prevent an outbreak of the Cherokee Indians. He was allowed pension in November, 1887, at the rate of \$8 per month, commencing January 29, 1887. On February 27, 1893, he applied for increase under the provisions of the act of January 5, 1893. This application was, on July 28, 1893, submitted by the examiner to the board of review for rejection on the ground that the applicant did not serve sixty days in Mexico, or on the coasts or frontier thereof, or en route thereto; and on the same date the examiner also submitted a recommendation that the pensioner's name be dropped from the pension roll on the ground that he had no title under the act of January 29, 1887. The proposed action was not approved, however, but by a certificate issued December 2, 1893, the rate of pension was increased to \$12 per month from November 24, 1893. Subsequently, on February 7, 1902, a reissue was made "to correct commencement of increase," and allow the same from October 12, 1893. Upon a request for a reissue to allow increase from January 5, 1893, it was held that the claimant had no title to pension prior to February 5, 1897, and no title to increase prior to April 23, 1900. From that decision an appeal was taken by claimant's attorneys on December 19, 1903.

The action appealed from was, in effect, a refusal to consider a claim for arrears of increase, said refusal being based on the ground that t^h

original allowance of pension was illegal, and that the appellant was not properly on the roll at the time of the passage of the act of January 5, 1893, nor until the passage of the act of February 5, 1897, which reads as follows:

Be it enacted, etc., That the Secretary of the Interior be, and he is hereby authorized and directed to place on the pension roll the names of all the honorably discharged surviving officers and enlisted men of Gray's Battalion of Arkansas Volunteers, raised under the act of Congress of May thirteenth, eighteen hundred and forty-six, for service during the war with Mexico, and the names of surviving widows of such officers and enlisted men, subject to the limitations and regulations of the pension laws of the United States for pensioning the survivors of the war with Mexico.

The act of January 29, 1887, under which the appellant was originally pensioned, provided pensions for the officers and enlisted men and widows of the officers and enlisted men of the military and naval services of the United States—

* * * who, being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto, in the war with that nation, or were actually engaged in a battle in said war, and were honorably discharged, and to such other officers and soldiers and sailors as may have been personally named in any resolution of Congress for any specific service in said war.

It appears from the evidence that the organization to which the appellant was attached never went to Mexico, rendered no service on the coasts or frontier thereof, and was at no time en route thereto, having been stationed during the whole period of its service at Fort Smith, Ark., or Fort Gibson, Cherokee Nation. It is not claimed that he was personally named in any resolution of Congress for any specific service in the war with Mexico. He, therefore, plainly, does not come within the provisions of the act of January 29, 1887, above quoted. The allowance of pension to him in November, 1887, seems to have been due to oversight or ignorance of the facts in regard to his service. (No report as to his service was obtained from the War Department until 1893.)

The act of January 5, 1893, provided as follows:

That the Secretary of the Interior be, and he is hereby, authorized to increase the pension of every pensioner who is now on the rolls at eight dollars per month on account of services in the Mexican war and who is wholly disabled for manual labor, and is in such destitute circumstances that eight dollars per month are insufficient to provide him the necessities of life, to twelve dollars per month.

This act authorized the increase of pensions of such persons only as were then "on the rolls at \$8 per month," etc. This must be construed to mean those who were lawfully on the rolls. This appellant was on the rolls, but without authority of law. He should have been dropped in accordance with the recommendation of the examiner in July, 1893. He was continued on the rolls and his pension increased, but such action was not authorized by any existing law and was clearly errone-

ous. Members of Gray's Battalion of Arkansas Volunteers first became pensionable on account of service during the war with Mexico, by virtue of the provisions of the act of February 5, 1897 (*supra*). They had no title prior to that date.

The appellant, having received a large amount of pension to which he was not entitled under the law (and which other members of the organization in which he served were denied) now claims additional pension on the ground that the refusal of the Bureau to allow the same is not consistent with its former action. As the former action was illegal it is not a case in which consistency should be maintained.

The appellant's attorneys cite, in support of their contention, the cases of William Wilson (10 P. D., 232), G. W. Lynch (14 P. D., 155), and Zachariah Winkler (9 P. D., 172). None of these is in point.

Wilson was pensioned under a practice based on a construction of law which was subsequently held to have been erroneous, but was continued on the rolls after the change of practice. The Department held that as long as his name was kept on the rolls he was entitled to increase of rating upon a proper showing of increase of the disability for which he was pensioned.

The appellant, Armstrong, was not pensioned as a result of erroneous construction of the law, but as the result of oversight or ignorance of material facts. The act of January 29, 1887, has never been construed by this Department so as to admit of the pensioning of the members of Gray's Battalion.

Garry W. Lynch, a soldier of the Mexican War, properly pensioned under the act of January 29, 1887, was allowed increase under the act of January 5, 1893, but from a date which the Department subsequently held to be erroneous. Upon appeal from the rejection of his claim for arrears of increase from the proper (earlier) date the Department held that while the allowance of any increase at all may have been a mistake, yet, if so, it was one of judgment merely, and the increase having been allowed it should be made to commence from a lawful date.

In the case now under consideration it is not a question of judgment as to whether the original allowance and subsequent grants of increase and arrears of increase were or were not warranted by the law and the evidence. As before stated, the original allowance was based upon oversight or ignorance of material facts, while the subsequent grants of increase were without authority of law. If the facts had been known in 1887, the claimant would not have been pensioned; if the law had been observed in 1893, his name would have been dropped from the rolls.

In the case of Zachariah Winkler, cited in the appeal, the question was whether the provisions of the act of January 5, 1893, were applicable to the survivors of Powell's Battalion of Missouri Mounted Vol-

unteers, who were made pensionable by an act passed March 3, 1891, of the same nature as the act making the survivors of Gray's Battalion of Arkansas Volunteers pensionable, passed in February, 1897. As the provisions of the act of January 5, 1893, applied only to persons who were then on the pension roll, they, of course, had no application to persons who were placed on the roll by virtue of an act passed subsequent to that time.

This soldier is now entitled to pension under the provisions of the act of February 5, 1897, and is entitled to the \$12 rate under the provisions of the act of April 23, 1900. All pension allowed him prior to February 5, 1897, was erroneously allowed, and while in view of all the circumstances it is not regarded as a case in which he should be required to refund such pension, it is certainly not a case in which he can justly claim any additional allowance. The action appealed from is affirmed.

MARRIAGE—SECTION 4705, REVISED STATUTES—EVIDENCE—COLORED PERSONS.

ADELINE ANDREWS (MINOR).

As the marital relations of claimant's mother and the soldier did not continue up to the time of the latter's enlistment, she can not be deemed the lawful child of the said soldier under the provisions of section 4705, Revised Statutes.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 15, 1904.*

On December 10, 1895, Adeline Andrews, a colored woman, filed a claim for pension under the general law, as the minor child of Henry Whitehurst alias Whitish, who enlisted as a private in Company B, Fourteenth United States Colored Heavy Artillery, on April 4, 1864, and died in the service on July 15, 1865. Said claim was rejected by the Pension Bureau in December, 1903, on the ground that she was without title under the provisions of section 4705, Revised Statutes, as her mother and the soldier did not live together up to the date of the latter's enlistment. From that action an appeal was taken by attorneys for the claimant on December 30, 1903.

It appears that the soldier and the mother of this claimant were married, according to slave custom, in North Carolina, about 1848 or 1849, and cohabited as man and wife and were recognized by their neighbors as such until the death of the woman in 1861. The claimant was born of this union on or about March 15, 1853. The soldier did not marry. The contention of the appeal is that the separation of her parents by death prior to the enlistment of the soldier did not impair the claimant's title to recognition as the lawful child of the latter under the provisions of section 4705, Revised Statutes. In support of

this contention reference is made to the decision of the Department in the case of the minors of Joseph Crane (4 P. D., 358), which is alleged to be "the present holding of the Department on this question." This is an error. The decision in the Crane case was overruled on December 22, 1893, in the case of the minors of William Toller (7 P. D., 545). The question came up again on a motion for reconsideration in the Toller case, in January, 1899, and after a full discussion of the points raised the motion was overruled and the decision of December 22, 1893, reaffirmed. The latter decision is "the present holding of the Department on this question." The gist of said decision is that only the minor children of a colored soldier by the woman with whom he lived in the relation of husband and wife up to the date of his enlistment, or to the date of his death if he died subsequent to his service, are entitled to pension as the lawful children of the soldier under the provisions of section 4705, Revised Statutes.

It is hardly necessary to add anything to the discussion of the question contained in the two decisions rendered in the Toller case. The argument of the attorneys in support of the pending appeal proceeds upon the assumption that a strict construction of section 4705 has the effect of depriving the children of slave marriages of a pensionable status that they would have had in the absence of that or similar legislation. It is said that by the action complained of "a penalty" is "visited upon the child because of the untimely death of one of her parents;" and that the law did not contemplate that the involuntary separation of the parents before the father's enlistment should "bar from pension" the children of such a union. Such argument is fallacious because based on false premises. In the absence of legislation similar to that now embodied in section 4705, Revised Statutes, the widows and children of colored soldiers who died during or shortly after the war would not have, as a rule, any pensionable status at all, owing to the impossibility of their establishing marriage and legitimacy under the laws of the former slave States. In most, if not all of said States, the assumption of marital relations by slaves, whether following "some ceremony deemed by them obligatory" or otherwise, had no legal effect. The parties to such union acquired thereby no rights or responsibilities of which the law took any account, and established no ties that might not be dissolved at their own pleasure or at the will of their masters. The children born of such unions stood in no different position before the law from that occupied by the offspring of temporary liaisons without any pretense of marriage.

Such was the condition of things when the Government began to enlist negro soldiers, and it became necessary to fix their status and that of their widows and children with respect to pensions. Laws were passed which finally took the form of section 4705, Revised Statutes, defining what evidence should be deemed sufficient to estab-

lish a marriage between colored people for pensionable purposes, and what children should be regarded as legitimate. It is a perversion of language to speak of such legislation as inflicting a "penalty" upon those whom it did not admit to pensionable rights. It did not put up a "bar" to pension against any class; it took down a bar. The misfortune of the appellant is that it did not take down enough bars to let her in. It was necessary to draw a line somewhere in regard to "marriages" so unstable as those contracted during slavery, and Congress chose to draw it so as to exclude those in which the marital relation did not continue up to the time of the soldier's enlistment, where he died in the service. It did so in language too plain to admit of doubt as to its meaning.

The widows of colored and Indian soldiers and sailors—

It said—

* * * shall be entitled to receive the pension provided by law without other evidence of marriage than satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory, or habitually recognized each other as man and wife, and were recognized by their neighbors, and lived together as such up to the date of enlistment, when such soldier or sailor died in the service, or, if otherwise, to date of death; and the children born of any marriage so proved shall be deemed and held to be lawful children of such soldier or sailor, etc.

This appellant is not the child of a marriage "so proved;" consequently she is not within the provisions of the law and her claim was properly rejected.

The rejection is affirmed.

MARRIAGE AND DIVORCE—DECREE OF NULLITY—EVIDENCE.

HANNAH A. RUMSEY (WIDOW).

The claimant obtained a decree of nullity out of a court of competent jurisdiction, the effect of which was to annul the second marriage ab initio and restore her to her status as the widow of the soldier; and there is an utter absence of any fraud on the part of either party to the decree. *Held:* This department has no warrant in pension claims, and in the absence of fraud against the Government to question the soundness of the judgment of a court of competent jurisdiction as to a question of fact, said judgment being a part of the evidence in such claim. The decree of nullity in this case is accepted as conclusive as to the facts and law therein recited.

Assistant Secretary M. W. Miller to the Commissioner of Pensions.
January 15, 1904.

Hannah A., as widow of Easman Rumsey, formerly a private in Company D, One hundred and seventy-ninth New York Volunteer Infantry, having been a pensioner under the general law, and her pension having ceased by reason of her remarriage, filed her application

for restoration on January 17, 1902, claim being rejected on September 5, 1903, in the following stated language:

Approved for rejection on the ground that the facts shown in evidence do not warrant the assumption that claimant's marriage with A. M. Holly on December 29, 1881, was void or invalid, and this Bureau is therefore not bound by the decree of annulment of said marriage obtained by claimant on January 10, 1902, for the manifest purpose of securing pension. (See S. E. reports and opinion of chief of law division.)

An appeal filed November 27, 1903, contends that the rejection was contrary to law.

It appears from an inspection of the evidence that this claimant on the 6th day of January, 1902, obtained a decree of nullity out of the supreme court of the State of New York, the material part of said decree being as follows:

And it is further ordered and adjudged that because of the lunacy aforesaid of said defendant the said marriage between the plaintiff, Hannah Augusta Holly, and the defendant, Anson Newman Holly, be, and the same is hereby, declared null and void ab initio and of no effect, and that no marriage or contract or relation exists or has ever existed between said plaintiff and defendant.

A transcript of all the proceedings in this case is on file, together with all the testimony given at the trial of the cause. The defendant was represented by a guardian ad litem, and the Bureau raises no question as to the jurisdiction of the court; and, in fact, no exceptions to the jurisdiction could be lawfully taken.

The opinion of the chief of the law division is of considerable length, and not only goes into the evidence adduced at the trial of the cause, but also discusses the warrant of the court, in law, for issuing the decree. In said opinion the following is found:

Claimant never attacked the validity of her marriage until a month before she filed this claim. It does not appear that she contemplated remarriage, and the fact that she executed the declaration only four days after the rendition of the decree shows that the real object of her suit was to enable her to procure additional pension from the Government.

The opinion then goes on to give the following quotation from the opinion in the case of Mary Gembe (13 P. D., 131) as part authority for the conclusions reached:

The true object of the petitioner was speciously concealed; and a deliberate fraud perpetrated on the court * * *. "He who seeks equity must do equity." This proposition is not one of law, but one of equity. The Department will, in the exercise of its valid powers, refuse to allow the Government to be mulcted in a claim based upon fraud. The foregoing is of itself reason enough for the Department to refuse to be bound by a decree of nullity.

After several other quotations the opinion concludes:

From these facts one of three conclusions must be drawn: (1) That she married Holly when he was capable of making a valid contract; (2) That she elected to keep the contract as a valid and subsisting one; or, (3) That, knowing her marriage to him was illegal, the relation she sustained toward him was not bona fide marital,

but one of mere concubinage. Either conclusion is inconsistent with the claim that she has been the true legal widow of the soldier ever since her marriage to Holly in 1881.

After a consideration of all the facts and circumstances of this case, and of the law applicable to the issues involved, it is concluded that claimant, in view of her entire conduct in connection with this case, has failed to prove that her marriage to Holly was void at the time of its consummation, and that, even if said marriage to Holly was void, claimant's conduct, after she learned of said Holly's insanity, either estops or prohibits her from receiving pension on the soldier's account after renouncing status as his widow for so many years; hence it is believed that the decree nullifying and declaring claimant's marriage to Holly void ab initio can not be regarded as having any weight in this case, and, consequently, her claim to pension as the widow of the soldier must fail, and it is so held.

Thus it is seen that a decree of the supreme court of the State of New York, which shows full jurisdiction and due consideration of all aspects of the case, is brushed aside as having no force whatever; and the Bureau of Pensions assumes the right to go into the merits of the case and decide that the judgment of the court was not warranted by the evidence and was contrary to law.

It is observed, although it is not entirely germane to the issue which is to be decided by the Department, that the plaintiff in this case made full proof that her husband was insane, non compos mentis, and absolutely incapable of entering into a marriage contract at the date on which he married claimant. She had some reasonable grounds for suspicion that he was insane, but the husband's family prevailed upon her to run the risk of his making an entire recovery. Within a very short time after the marriage he exhibited continued signs of insanity, and his condition grew gradually worse until, eleven years after the marriage, he was sent to the Insane Asylum. She cared for him all of this time, and conducted herself as a true wife should, and did not give him up until his case appeared to be hopeless. So far as the facts in this case go, the Department is thoroughly of the opinion that Holly was insane at the date of his marriage with claimant, and had been for years prior thereto.

All this, however, is somewhat wide of the mark; for the supreme court of New York passed upon this phase of the case, and it only remains to decide as to whether or not the Department will accept the decree of nullity as conclusive. It was held, in the opinion in the case of Melissa Boyd (14 P. D., 279), that a decree of divorce, valid in the State in which it was rendered, would be accepted by this Department as conclusive; although it reserves for itself the right to inquire into any indication of fraud practiced by either party to the decree, for the purpose of affecting the pensionable rights of any person. And what is true regarding a decree of divorce, as has just been stated, is equally true of a decree of nullity, which bears a strong resemblance, in its basic principles, to a divorce decree; though in one respect the decree of nullity is far more reaching in its effect than a decree of divorce; for a decree of nullity restores a party to his or her

original status, the same as if no marriage had ever taken place; while a decree of divorce simply severs the marriage relation, and may not affect, in many instances, past acts.

The evidence in the case under consideration fails to disclose the slightest indicia of fraud on either party to the decree of nullity. There is no ground for assuming the claimant applied for a decree of nullity solely for the purpose of obtaining a pension; but if she did, she had full right to so do, and was clearly within her legal prerogatives. Is fraud against this Government to be presumed because one attempts to establish a status whereby he or she may receive a pension? The proposition is too unsound to merit discussion. There may be very good reason why this claimant, or any other claimant, who was entitled to a decree of nullity, would never attempt to obtain such a decree unless she could obtain some pecuniary benefit thereby. Individuals are not bound to assert all the rights they have, under the law, until such time as they see fit to do so; and their actions, in such respect, are usually governed by the circumstances surrounding themselves.

It is difficult to see how the Bureau arrived at the conclusion it did; for, as the facts in this case show, there is an utter absence of even indicia of fraud on the part of the claimant, and the holding in the Gembe case, if it is of any value in the present case, practically overthrows the conclusion of the Bureau on the issue involved, fraud being entirely absent.

It is not a matter of the slightest moment officially to any branch of this Department, or to any person connected therewith, whether or not a claim is rejected or admitted. The law applicable is to be administered as it is found, and a claim shall stand or fall according as the law to be applied to each particular case demands. A valid decree of nullity or a valid decree of divorce is as legally binding and conclusive as is a valid marriage, and is entitled to an equal degree of respect. If by virtue of a valid decree of nullity one establishes a pensionable status, that status is just as unassailable and legal as it would have been had the annulled marriage never taken place. This Department has no warrant, in pension claims and in the absence of fraud against the Government, to question the soundness of the judgment of a court of competent jurisdiction as to a question of fact, said judgment being a part of the evidence in such claim.

The evidence in this case shows a decree of nullity granted by a court of proper jurisdiction, the record shows all necessary jurisdictional facts, and no issue is taken upon this point. There was no fraud, actual or constructive, of any kind or nature, and this Department is certainly bound in all good conscience to respect the said decree. Its legal effect is to restore the claimant to her status as the widow of Easman Rumsey, and she is hereby held to be his widow.

Action reversed.

DEPENDENT RELATIVES—ILLINOIS—HUSBAND AND WIFE.

THOMAS J. DOLAN (FATHER).

By statutory enactment the State of Illinois has made the separate estate of husband and wife liable for the "expenses of the family," whether incurred by husband or wife. Reflexively this statute, while defining a creditor's rights, operates to give to a husband such an interest in his wife's estate that the extent, character, and value of her said estate become material in the determination of the dependency of a father.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 15, 1904.*

John A. Dolan served in Company C, Thirty-seventh United States Volunteer Infantry, in the war with Spain, dying in service on October 20, 1900.

He was survived by a father, Thomas J. Dolan. His own mother died in 1885. On July 22, 1901, the father applied for a dependent father's pension (No. 745572) under section 4707 Revised Statutes, as amended by the act of June 27, 1890. The claim was rejected April 30, 1902, on the ground that he is not dependent within the meaning of the law, being possessed of an income which, together with a home, owned by his wife, affords him an adequate support. He appealed April 29, 1903. The appeal was made special.

There is no dispute as to the facts germane to the issue so far as they are in evidence. The claimant is an old man, about 70 years of age. His present wife, the soldier's step mother, is possessed of some property—a home at least. Husband and wife live in this house, her property. The claimant has no regular employment, but from commissions, etc., he earns about \$200 a year. This, he says, is inadequate to provide a support. The home must not be considered, he maintains. It is the property of his wife; it belonged to her in fee simple before they were married. She may dispose of it, he says, without his knowledge or consent under the law of the State in which they reside (Illinois). He could not retain any part of the proceeds of said sale for himself. She is under no legal obligation to furnish him a support, "notwithstanding she may be in possession of ample means."

This is his contention.

It is true that the right of curtesy has been abolished by legislation in Illinois, but the statute abrogating this common-law right especially provides that husband and wife shall be each endowed of the third part of the lands of the other. It is not true that the wife in the case at bar can dispose of her realty to defeat his interest therein. His statutory interest in her real estate can not be involuntarily lost by him. For the wife to pass good title to her real estate the signature of the husband to the instrument of conveyance is as essential as is her relin-

quishment of dower in the enfeoffing of others in his estate. Section 9 of chapter 68, Revised Statutes, Illinois, gives to the wife the same control over her property—e. g., the selling of it—that the husband has over his—i. e., the dower right in real estate must be considered. Her rights are limited to this extent.

The statutes of Illinois endeavor to place husband and wife upon the same plane in respect to property rights. The common law obligation on the part of the husband to support his wife survives. But the statutes also give to creditors, under certain circumstances, rights against the wife's separate estate even where the obligation is incurred by the husband.

Neither husband nor wife shall be liable for the debts or liabilities of the other incurred before marriage, and (except as herein otherwise provided) they shall not be liable for the separate debts of each other, nor shall the wages, earnings, or property of either; nor the rent or income of said property be liable for the separate debts of the other. (Rev. Stat. Illinois, ch. 68, sec. 5.)

The exception above noted is provided by sec. 15 of said chapter:

The expenses of the family, and of the education of the children, shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto, they may be sued jointly or separately.

There is no statute by which a wife incurs penal consequences if she does not support her husband such as there is in the event of his delinquency in this respect. But for practical purposes—for all purposes with which we are concerned—the effect is the same. The husband is a part of the "family." He may incur bills for necessities of life, his support, his adequate support; if he has no estate the creditor may proceed against the property of his wife. Certain articles, such as a ring, have been declared by decisions of the court of last resort in that State not to be a family expense.

An article is not a family expense, within the meaning of the statute, where it in no way conduces to the welfare of the family generally, though at times used or displayed in the family by the member for whom it was purchased. (*Hyman v. Harding*, 162 Ill., 357.)

But common necessities of life clearly come within the purview of the act. Doctor's bills for medical services rendered the husband personally were declared to be chargeable against the wife's separate estate, under this statute, in the case of *Glanbenskee v. Low* (29 Ill. Ap., 408); goods purchased by the husband for his own personal use (clothing, for example) were brought within its purview by the decision in the case of *Hudson v. King* (23 Ill. Ap., 118), and the rent of a house occupied by the family was also viewed as a family expense in the case of *Illingsworth v. Bailey* (33 Ill. Ap., 394).

It is clear, then, that claimant's wife may not sell her real estate so as to bar his endowed interests therein without his formal acquiescence in her act. If they do dispose of it, the proceeds, in whatever

form it may be, real or personal, will be holden by creditors for the rent of any house they may occupy. While they are living together, he still enjoys his common-law right of using said property. If she abandons him, he is not helpless, for another section of the chapter above mentioned provides, in that event, that the property may be sold or disposed of by order of court "for the support and maintenance of the family and for the purpose of paying debts of the other, or debts contracted for the support of the family." (Rev. Stat. Ill., ch. 68, sec. 11.)

In short, the husband's interest in his wife's property, his "rights" therein (to use the same expression employed with reference to the wife's interests in the husband's estate), in Illinois is so much the same as her interest is in his estate, that, in determining this question of dependency, it is essential that this Department should have more information as to the wife's financial status in this case. It will be noted, both in this case and in others arising within the jurisdiction of that State, hereafter, where the claim is for a dependent father's pension, that it is as essential in the adjudication of such claims to know the value, character, and extent of the wife's property (if there be a wife), as it is in relation to the husband's estate in the case of a mother's claim.

These people reside in Chicago. If the wife owns a house, merely a shelter, and they are dependent for their support in other respects upon his earnings, i. e., \$200 per annum, one situation is presented. If, on the other hand, she has a home and a personal separate income, adequate for the family expenses, another situation is presented. In view of the laws of the State, the extent of her possessions is material to the present issue. That is not in evidence.

The papers in the case are therefore returned to you, with directions to order a special examination immediately, to ascertain the extent, nature, and value of her estate, real and personal. The scope of the inquiry might be enlarged to include his physical condition and earning capacity.

Upon the conclusion of this examination you will return the papers in the case, with your report, to this Department for final adjudication. In the meantime the appeal will be held in abeyance.

SERVICE ACTS OF JULY 27, 1892, AND JUNE 27, 1902—INDIAN WARS.

JOHN L. JOHNSON.

"The act of June 27, 1902, extending the provisions, limitations, and benefits of the act of July 27, 1892, does not limit its benefits to those who served and were discharged under the immediate military authority of the United States only, but to those who served and were discharged under State, Territorial, or provisional authority as well." (See case of Lewis Lawley, 14 P. D., 13.)

Held: That for pensionable purposes the roll on file in the Office of the Auditor for the War Department, showing the date and place of muster in and muster out, and that claimant served more than thirty days, is sufficient evidence of service to the Government of the United States, within the meaning of the terms of the act of June 27, 1902.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, January 19, 1904.

John L. Johnson, of Capt. F. M. P. Goff's company, K, Second Washington Territory Mounted Volunteers, Indian wars, 1851-1856, filed a claim for pension under the provisions of the act of June 27, 1902. The claim was rejected May 22, 1903, on the ground that the official records fail to show that the soldier's service with Captain Goff's company, K, Second Washington Mounted Volunteers, was in the employ of the United States Government, or that payment has been made for such service by said Government.

The recognized attorneys appealed from this action October 26, 1903, contending that the departmental decision in the case of Lewis Lawley (14 P. D., 13) governs in all claims for pension based on service in the Indian wars from 1817 to 1858.

The report of the Auditor of the War Department, who has custody of the rolls of volunteers employed in the Indian wars or disturbances, shows that the claimant was mustered in April 28, and was discharged August 13, 1856, the period of service being 108 days.

The act of June 27, 1902, which is fully quoted in the case of Lewis Lawley (14 P. D., 13), extends the provisions of the act of July 27, 1892, so as to include those persons:

who served for thirty days or more and were honorably discharged under the United States military, State, Territorial, or provisional authority in * * * the Oregon and Washington Territory Indian wars from eighteen hundred and fifty-one to eighteen hundred and fifty-six, inclusive.

It is evident that in considering this claim the Bureau set up as a primary obstacle that the official records fail to show that the service rendered by the claimant was in the employ of the United States Government.

The only official records of service in this case, and all similar cases where volunteers were called out to meet sudden emergencies arising in Indian disturbances, are the rolls in the custody of the Auditor for the War Department, showing the date and place of muster in and muster out.

The Bureau appears to be somewhat inconsistent in raising this barrier, for in cases where these same official records show that the soldier did not serve thirty days, the claim is promptly rejected, on the ground that the record shows the soldier did not serve thirty days, as required by the act. If this record is sufficient authority for the rejection of the claim, why is it not sufficient authority upon which to allow a claim?

As to whether or not the records show that these men rendered service to the United States Government, the Congress, by its enactment of a law providing pensions for service rendered by them, determined that question in the affirmative. Independent of that, whenever troops or volunteers were called out to quell Indian disturbances on the frontier, the Indians being the wards of the nation, these troops necessarily rendered service to the United States Government. To hold, therefore, that they did not serve the United States Government would be equivalent to saying that the Congress did not mean what is said in the act of June 27, 1902, extending the provisions of the act of July 27, 1892, so as to include those persons who rendered service that this claimant did.

In the case of Lewis Lawley (14 P. D., 13), the Department held:

The act of June 27, 1902, extending the provisions, limitations, and benefits of the act of July 27, 1892, does not limit its benefits to those who served and were discharged under the immediate military authority of the United States only, but to those who served and were discharged under State, Territorial, or provisional authority as well.

The official records, the rolls on file in the Office of the Auditor of the War Department, show that Lawley served in Company D of the same regiment as this claimant.

Section 3, of the act of July 27, 1892, the provisions of which are extended by the act of June 27, 1902, provides among other things:

That before the name of any person shall be placed on the pension roll under this act, proof shall be made, under such rules and regulations as the Secretary of the Interior may prescribe, of the right of the applicant to a pension.

It is therefore held, that for pensionable purposes the rolls on file in the Office of the Auditor for the War Department, showing the date and place of muster in and muster out of this claimant, and that he served 108 days, is sufficient evidence of service to the Government of the United States within the meaning of the terms of the act of June 7, 1902. The action appealed from is accordingly reversed, and you are directed to readjudicate the claim in harmony with this opinion.

SERVICE—RECORD—EVIDENCE—ACT OF JUNE 27, 1902.

SAMUEL T. CURTIS.

There is no record evidence to show that the claimant ever rendered the service alleged, or that he was paid for such service by the United States. Hence the Department is without authority to grant pension under the act of June 27, 1902.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 19, 1904.*

Samuel T. Curtis filed a claim, No. 7641, December 2, 1902, for pension under the provisions of the act of June 27, 1902, extending

the provisions of the act of July 27, 1892, alleging that he served as a private in Captain Caldwell's company, Utah Volunteer Cavalry, during the Utah Indian disturbances in 1853, for more than thirty days. The claim was rejected June 1, 1903, on the ground of no record of the service alleged and no record of payment therefor by the United States Government.

November 21, 1903, the recognized attorney entered an appeal, contending that the service rendered by the claimant seems to have been performed under the same circumstances and conditions as that of Lewis Lawley (14 P. D., 13), both under Territorial organizations of the same character and nature and so recognized by the Government of the United States by appropriating money to meet the expenses in suppressing Indian hostilities.

The departmental decision in the case of Lewis Lawley (14 P. D., 13), referred to in the appeal, was based upon the record on file in the office of the Auditor for the War Department, showing that the claimant served more than thirty days under the Territorial authorities of Washington Territory, and that consequently he came within the provisions of the act of June 27, 1902, extending the provisions of the act of July 27, 1892, so as to include those persons who served for thirty days or more and were honorably discharged under the Oregon and Washington Territory authorities in the Indian wars from 1851 to 1856.

The act of June 27, 1902, reads as follows;

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions, limitations, and benefits of the act entitled "An act granting pensions to survivors of the Indian wars of eighteen hundred and thirty-two to eighteen hundred and forty-two, inclusive, known as the Black Hawk war, Creek war, Cherokee disturbances, and the Seminole war," approved July twenty-seventh, eighteen hundred and ninety-two, be, and the same are hereby, extended, from the date of the passage of this act, to the surviving officers and enlisted men, including marines, militia, and volunteers of the military and naval service of the United States who served for thirty days or more and were honorably discharged under the United States military, State, Territorial, or provisional authorities in the Florida and Georgia Seminole Indian war of eighteen hundred and seventeen and eighteen hundred and eighteen; the Fevre River Indian war of Illinois of eighteen hundred and twenty-seven; the Sac and Fox Indian war of eighteen hundred and thirty-one; the Sabine Indian disturbances of eighteen hundred and thirty-six and eighteen hundred and thirty-seven; the Cayuse Indian war of eighteen hundred and forty-eight on the Pacific coast; the Florida wars with the Seminole Indians, from eighteen hundred and forty-two to eighteen hundred and fifty-eight, inclusive; the Texas and New Mexico Indian war of eighteen hundred and forty-nine to eighteen hundred and fifty-six; the California Indian disturbances of eighteen hundred and fifty-one and eighteen hundred and fifty-two; the Utah Indian disturbances of eighteen hundred and fifty to eighteen hundred and fifty-three, inclusive, and the Oregon and Washington Territory Indian wars from eighteen hundred and fifty-one to eighteen hundred and fifty-six, inclusive; and also to include the surviving widows of such officers and enlisted men: *Provided*, That such widows have not remarried: *And provided further*, That where there is no record of enlistment or muster into the service of the United States in any of the wars mentioned in this act the record of pay by the United States shall be accepted as full and satisfactory proof of such enlistment and service.

It will be observed that this act also extends its provisions so as to include those persons who served thirty days or more in the Utah Indian disturbances, from 1850 to 1853, inclusive. Up to this point the case of Lawley and this case are analogous, but here the analogy ceases; for while in the Lawley case there is a record in the office of the Auditor for the War Department, the muster roll showing that the claimant served more than thirty days, while in the case under consideration neither the records of the Auditor for the War Department nor the records of the War Department itself show that the claimant rendered the service alleged.

The Auditor for the War Department reports, under date of April 21, 1903, that there are no rolls of Captain Caldwell's company of Utah Volunteers on file in his office. The Record and Pension Office, War Department, also reports, under date of March 9, 1903, that there are no rolls on file in that office of Captain Caldwell's company, Utah Volunteers (1853-54).

A service pension under any law must be based upon some evidence satisfactory to this Department, showing that the person claiming pension thereunder rendered the service alleged.

If there ever existed a muster roll of the company in which this claimant alleges he served, it is not in evidence and not accessible to this Department, and until such muster roll showing that the claimant rendered the service alleged or a record of pay by the United States is in evidence, the Department is without authority of law to grant a pension in this case.

The Bureau action appealed from was proper, and the same is hereby affirmed.

DEATH CAUSE—PREDISPOSING CAUSE—EPILEPSY.

LAURA E. CARRIER (WIDOW).

The evidence shows, in soldier's temperament and constitutional tendencies, a predisposition to epilepsy which developed in the service as the result of an attack of otitis media (suppurative) contracted in line of duty. The predisposition is not a bar to pension; and the widow is entitled under the general law, it being admitted that soldier's death cause was epilepsy.

Mere aggravation in service of a preexisting disease is not pensionable; but where a disease develops in service, starting with some injury or ailment incident to line of duty as the proximate efficient cause thereof, albeit there is a preexisting tendency, a natural predisposition, to the disease thus developing, said predisposition does not operate as a bar to pension, if claimant is otherwise entitled.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 21, 1904.*

The appellant in this case is Laura E. Carrier, the widow of Stephen B. Carrier, who served in Company K, Fortieth United States Volunteer Infantry, in the war with Spain. The soldier enlisted September

20, 1899, and was discharged on December 18, 1899, on a certificate of disability. He applied for a pension on December 23, 1899, alleging epilepsy and deafness, as of service origin. Before this claim was adjudicated, however, the soldier died. The date of his death is May 1, 1900, and the cause was unquestionably epilepsy.

On August 24, 1900, the widow filed her declaration for a pension under the general law (725280). After an exhaustive special examination the claim was rejected April 17, 1902, on the ground of claimant's inability to furnish satisfactory proof that the fatal epilepsy originated during soldier's service and in line of duty, "the soldier having suffered from a blow on the head, delirium, fever, and affection of the ears prior to his military service." From this action an appeal was filed April 25, 1902. Before considering the clinical history of soldier's case furnished by the medical records of the War Department, there are certain questions raised by the action of rejection requiring attention and disposition. For the whole inquiry in this case must be into the etiology of soldier's fatal epilepsy. It is suggested in the action of rejection that epilepsy was not incurred in service, but was due to preexisting causes: "blow in the head, delirium, fever, and affection of the ears." At least, if that is not the theory upon which the rejection of the claim is based, it is utterly immaterial to the present issue whether he had these diseases prior to his acceptance into the military service of the United States, or not.

Mention is made of a "blow on the head." It appears that in September, 1898, the soldier had an altercation with a negro, ending in an assault by the latter. The testimony of those who heard about it is very confusing; some understood that he was struck on the breast; others in the shoulder; others on the face; others on the head. All agree, however, that no serious results followed—soldier was more scared than hurt.

As a matter of fact, as shown by the testimony of those not relying upon hearsay knowledge only, the negro struck soldier with his fist on the chin, for which assault, it is of record, he was fined the sum of \$1.

John L. King saw the fight between soldier and the negro. The negro struck Carrier on the "side of his chin"—hit him with his fist "but one lick." It did not knock soldier over, but "it frightened him pretty bad at the time." The blow "grazed a little skin of his face but did not cut deep." He was not hit on the head. A few days after this soldier had a bilious attack. He never knew of soldier having fits of any kind before service.

Perry Best said that the negro did not hurt him very much—hit him on the side of his face with his fist.

Jesse Carrier, an uncle, saw soldier the evening of his row with the negro. He was more frightened than hurt, in deponent's opinion. He was hit on the side of his face. About a week after, soldier was

ill—stomach, head, and fever. He was subject to sick headaches and was slightly hard of hearing. He never knew of him having fits before service.

The soldier went to work the next day, but returned with a chill, followed by fever. It will appear later in evidence that soldier had malaria and was subject to bilious attacks. The party evidently responsible for this theory that the blow caused the trouble is one Francis W. McKee, who knew nothing whatever about the facts. His testimony was founded on hearsay, and is contradicted by all the testimony in the case. There is a good deal of testimony on the part of those who knew soldier that the blow on the chin had no consequences whatever. Witnesses who have no interest in the claim make light of the assault.

Of course epilepsy may be due to trauma. But it will later be shown that there is a much more reasonable theory as to the causation of the disease in this particular case.

Again, reference is made to delirium and fever which soldier had prior to enlistment.

This undoubtedly refers to an attack which soldier had in August, 1899, when his parents were living on what is referred to in the evidence as the Mackey place. The soldier, who was a railroad employee at that time, came home with a high fever, preceded by a chill. He became very ill and was delirious, according to the testimony of his father, mother, and brother. The latter went for Doctor Oatman.

This incident would have been of little consequence in this case if it had not been for the hearsay testimony of George Haskins.

George Haskins first knew soldier in 1898. There was a time, he said, when they lived on the Mackey place, that, he understood, soldier came near dying, "as he had spasms, and it took two or three men to hold him in bed." This was before he enlisted. The Rev. Mr. McPhee and others went to the house and prayed with soldier. The deponent's statement is mere hearsay. The deponent's wife testified in the same vein, but her knowledge, like that of her husband, was founded on hearsay.

This yarn is entirely disproved by those who were present.

Mrs. Mary A. Jackson accompanied Mr. McPhee to the house to pray with the soldier. They found him suffering with a severe pain in his head—"so bad that he couldn't stand the least noise." He had a fever, but he was not unconscious. She understood that it was due to a partial sunstroke. He had no spasms or convulsions while she was there, and she never heard from any source that he had spasms or fits before his discharge from service. This sick spell was in August, 1899, and lasted a few days.

Jennie Pine was a member of the party that went to pray at soldier's bedside on this occasion. They were there about five hours. He was

unconscious when they got there. He had a high fever and was delirious. He complained of pain in his head. He had no spasms or convulsions. She did not understand that it was due to any sunstroke. She saw him during his epileptic attack after the war, and she is sure he had nothing of that kind when she went to see him on the Mackey place.

The Rev. Moses McPhee corroborates the statements. He had a high fever and suffered pain in his head, but there were no convulsions or anything of that kind at all. He was sick a short time only. The cause of the attack was unknown to deponent. He never heard that soldier had "fits" before the war.

If there existed any doubt as to the nature of this illness at the Mackey place in the summer of 1899, the testimony of Dr. Homer C Oatman, then of Kansas, where these parties lived, and now of California, removes it. He was called to see the soldier on August 2, 1899.

He had a pernicious type of malaria, I think, in the attack when I saw him. He was very sick and was wild. They had to hold him in bed. He had had a chill, and this was the reaction. Fever was high—an excessive temperature—and he was in wild delirium from that cause. * * *

There were no spasms or convulsions—simply delirious, such as is common in violent malarial cases.

There were no complications and no results so far as the doctor knew.

The above testimony definitely negatives the idea that soldier had any spasms or epileptic convulsions on that occasion. His delirium was due to fever—fever of a malarial type. And malaria can not be regarded as a factor in causing epilepsy.

What, then, was the state of soldier's health prior to enlistment? Upon that point the testimony of those who knew him is herein introduced.

Laura E. Carrier, the widow, thus described her husband's physical condition prior to enlistment: He was subject to sick headaches, but did not become unconscious or "out of his head;" but he did have "awful headaches" for a day at a time, and "his head would pain him awfully." He had bilious attacks, accompanied by high fever and delirium. He talked a great deal in his sleep, was restless, and subject to nightmares. He had catarrh, and his breath was offensive. "He also had gatherings in his ears off and on, as long as I knew him."

Sometimes he would suffer a good deal of pain when the gatherings were coming on, and would get relief when they would break and discharge from his ears; sometimes one ear and sometimes both.

Soldier was nervous, but no more so when he had these "gatherings" than at other times. Sometimes his hearing was bad. The soldier never had "fits" or epilepsy before service.

James L. Carrier, soldier's father, deposed that soldier never had

any illness except such as is incidental to childhood. But he did have a "gathering" in one ear when he was about 3 years old, and ague the summer of 1899. He was subject to chills and fever and to headaches. His hearing was bad at times, attributed by the witness to the use of quinine for malaria. He was naturally nervous and excitable. He never had "fits" or anything akin to epilepsy before service. After service he had epilepsy. There was a swelling under one ear. A doctor told the soldier, so soldier told him, that he should go to a hospital and have "some kind of a tube or drain in the swelling on his neck." The boy "complained at times of a pressure on the inside of his head and at the root of his tongue."

Nancy J. Carrier, the mother, testified that soldier never had fits or convulsions before enlistment. He had earache "once in a while" and, the summer of 1899, chills and fever. When he was a small child, "not more than 3 years old," he had a "gathering" in one ear, due to a cold. As a boy he was subject to chills and fever.

Sarah K. Carrier, a sister, said that the "only ailment" that she ever knew soldier to have before enlistment was "catarrh of the head, which he had from the time he was a small boy." It affected his hearing. When he was 18 or 19 years old, he had a gathering in his ears. He suffered from earache a good deal. "It was caused from the gathering in his head." But he never had fits, or spasms, or convulsions.

Daniel S. Carrier, a brother, said that his brother was subject to chills and fever and to headaches, but never to fits, before his service.

Robert B. Carrier, an uncle, never knew that he had any ailment before service except an attack of malaria during the summer of 1899. He was a restless sleeper; would "thrash about" and talk in his sleep.

Margaret Carrier, an aunt, said that he occasionally had nightmares, but she never knew of his having any disease before service; he certainly did not have fits.

John J. Craig, claimant's father, deposed that his son-in-law, the soldier, had bilious attacks before enlistment. "He would be taken with blind, sick headaches, and he would go to bed and be delirious at times." When he would get "his liver working," he would be all right. He was nervous and excitable, "and would get awful mad." He was "a little hard of hearing from the time he was a small boy."

Mary L. Thompson deposed that soldier had an attack of malaria in 1898, and was delirious during the fever. She never knew of him having any trouble with his head except "simple-mindedness." She never knew that he had fits before service, and never heard that he had.

Alfred A. Bowen knew soldier in the spring of 1899, when soldier worked for him. His hearing was "not extra good"—noticeably so at times. He knew nothing of any gatherings in his ears and he never had fits. He was a rugged, healthy fellow.

John W. Lawson knew soldier from the spring of 1898, and deposed that he was a "very healthy, rugged-looking fellow." He told him

that he hurt his back while working for Mr. Bowen. Soldier worked for deponent several months. He never had "fits" of any kind. After service, however, he had epileptic fits. Soldier's hearing was all right before service, when he worked for deponent.

Mrs. Lawson's testimony corroborated her husband's account.

Charles H. Harris, a section "boss" on the Union Pacific Railroad, under whom soldier worked in 1898, deposed that he was a good worker and was in good health. "He had nothing the matter with him." He did have nightmares and would talk in his sleep and at times "get to pounding the sides of the car" in which they bunked. He would stop when they touched him. "He had no fits of any kind."

Scott Scovell, another railroad "boss," wrote that he (soldier) never had fits, but that during the nighttime he would "moan and tumble around" in his bunk.

The special examiner reports that the soldier's family are people of good repute for truth, "but are not considered overly bright."

None of the Carrier family are considered mentally strong, as there is a peculiarity that runs through the family, indicating a mental irresponsibility.

The evidence collected by this examiner warrants this conclusion, so far as soldier at least is concerned. The nightmares, his restlessness during sleep, his talking in his sleep, the easily excited delirious condition caused by rise of temperature, his nervousness, his excitability, his headaches: all point to degeneracy—to the existence of a neurotic condition. But they do not point to epilepsy; they simply point the way.

It is certain from this evidence that the soldier never had epilepsy prior to enlistment. His general health was good. He was subject to attacks of malaria. But none of these things cause epilepsy.

Aside from the fact that soldier was neurotic, the only thing in his history, prior to enlistment, of significance in this case is his trouble with his ears. His hearing, due to catarrh, perhaps, was not acute at all times. Certainly, in childhood and when he was 18 or 19 years of age (he was 23 at enlistment) he had "gatherings" in his ears. It is also in evidence that he was subject to earaches at times, and it is probable that he had these gatherings occasionally. It is not in evidence, however, that he had any special ear trouble at or for a long time prior to enlistment. Certainly he did not have any chronic suppurative disease of the ears. Aside from the tendency to trouble with his ears, it must be presumed that he was physically sound at enlistment. He enlisted subsequent to the war with Spain in a volunteer organization raised to serve in the Philippines. The presumption is that he was subjected to a thorough medical examination at the time of his enlistment.

We now come to the medical history of the soldier during his service. He enlisted September 20, 1899. He stated in his claim for

pension that he contracted a cold which resulted in impaired hearing and in epilepsy, the first "fit" occurring on October 8, 1899. The record shows that from October 8 to December 18, 1899, the soldier was in the hospital at San Francisco for acute gastritis and "otitis media, suppurative, acute, both ears, in line of duty." He was discharged December 18, 1899, on a surgeon's certificate of disability. The cause of disability is stated to be "otitis media suppurative, right and left." It was further stated that the disability was incurred in line of duty. But the cause of otitis was unknown and the condition unchanged (he had been in the hospital since October 9). The following most significant statement is made:

This soldier has regular attacks of hysterical convulsions.

In view of his clinical history there is no question as to the nature of these "hysterical convulsions." The diagnosis properly should have been epilepsy.

From that time on until his death there is a history of epilepsy, to which he finally succumbed.

Epilepsy, then, developed while he was a soldier and continued to exist until his death.

The question is, what caused his epilepsy? From the history of the case, there can be but little doubt. It was in his case organic, not idiopathic. Epilepsy, it must be remembered, is a symptom, not a disease. In this case it is undoubtedly symptomatic of a brain lesion caused by disease of the middle ear. This pathology is well recognized. "Abscesses of the brain" and "ear disease" are given among the causes of organic epilepsy by Dr. L. C. Gray in his article in Dercum's work on "Nervous diseases." An abscess formed in the middle ear in service; a secondary abscess formed in the brain. Epilepsy followed—the more easily perhaps because by nature soldier was neurotic.

It is stated in Dercum's work, to which reference has been made, that—

the most common cause of abscess in the cerebrum is, however, not traumatism, but chronic suppurative otitis media.

The blow on the chin in September, 1898, diminishes vastly in importance in view of the suppurative otitis media of October–December, 1899.

This suppurative condition of the ears resulted from a severe cold contracted in the service. Line of duty must be presumed from the record.

The evidence shows a condition in service and after service differing entirely from soldier's ante-service clinical history. Yet it is a fact that, prior to enlistment, soldier was so constituted in temperament and in physical disposition that this development of disease in the service is not surprising. Soldier had a natural tendency in the direc-

tion both of disease of ear and of some form of neurosis. The question is, under the circumstances, in view of this inherent constitutional tendency, is his epilepsy so chargeable to his military service that his widow is entitled to a pension?

The question is not a new one. The principle involved has been considered by this Department in other cases and has been well defined.

In the case of Rudolph M. Montgomery (3 P. D., 41) the evidence showed that soldier, prior to enlistment, had a "lame back" (lumbago) "for four years until within one year previous to enlistment," according to one statement, and for that period, "except one interval of a few months," according to other testimony. The soldier enlisted September 23, 1862. In January or February, 1863, he fell, injuring his back; and said accident "did revive and aggravate the original disability, from which he had apparently recovered at the date of enlistment." It was held that soldier was pensionable:

Where a disability, which originated prior to enlistment, but was apparently cured prior to and at the date of enlistment, is revived and aggravated as the immediate result of an accident or of an incident in the line of duty, the injurious consequences of such aggravation may be pensionable under a liberal construction of the law.

The principle stated in the above syllabus was reaffirmed in the case of James Shaffer (5 P. D., 6).

In the case of Joseph M. Potter (3 P. D., 82) it was in evidence that soldier had had rheumatism prior to enlistment. The surgeon's certificate of disability for discharge, based upon rheumatism, contained a statement to that effect. As a matter of fact, the claimant did have rheumatism in 1857. He apparently recovered therefrom and was accepted into the military service in 1861. In 1863 he had an attack of rheumatism and was discharged as unfit for duty. It was held that he was pensionable. The prior attack of rheumatism might have created a predisposition to the later attack. The rheumatic diathesis might have been present. But it was held:

Where it appears that, prior to enlistment, claimant had a disease which may have created a predisposition to the recurrence of the same, rendering his system more liable than otherwise to a second attack from exposure or unusual hardship, and yet, when it appears that there had been, prior to enlistment, a complete recovery from the first attack, and the circumstances necessary to produce the disease, or a recurrence of the same, are due to the performance of claimant's duty as a soldier, and were legitimately incidental to the service, it is held that the recurring disability is pensionable under the law.

Bernard Bruner (3 P. D., 228) applied for a pension, through his guardian, on account of insanity. The surgeon's certificate of disability for discharge was based upon "mental imbecility, with symptoms of insanity. * * * Disability existed prior to enlistment." The evidence showed that soldier was "peculiar" and "simple" before service. He enlisted August 22, 1862. Three or four months later he developed, with no apparent existing cause, symptoms of insanity,

leading to his discharge. It is probable that, as in the case at bar, the soldier was of neurotic temperament—a degenerate. Yet it was held in that case that soldier was pensionable:

It is a rule of practice that an unusual susceptibility to some form of disease, existing before enlistment, is no bar to pension, if the disease did not develop until after the claimant's admission to the service.

In the case of Daniel Dailey (4 P. D., 337), it appeared from the surgeon's certificate of disability for discharge that soldier was unfit for the performance of his duties "because of necrosis of tibia of left leg."

The disease made its appearance in early life, which recovered with bad deformity. The symptoms serve to indicate a return of the disease.

But it was manifest that soldier was sound at enlistment; at least, the trouble was latent and not disabling, nor did it become so for a number of months after enlistment. It was held that the claimant was entitled to a pension.

In the case of Andrew J. Fleener (9 P. D., 133) it appeared that from a child he was subject to "frequent attacks of what is called phthisic, sore throat and a cough, and these spells continued through several years as he grew older, recurring almost every winter." He was apparently sound, however, at enlistment, August 15, 1862. In November of that year he contracted measles; at least he so claimed. He was discharged in January following, because of "tuberculosis, with cavity of the right lung, extreme emaciation, night sweats, and severe cough. Disease contracted prior to enlistment." In part, his claim for pension was based upon chronic bronchitis, result of measles. Pension was denied on the ground that the evidence did not show recovery from the old trouble prior to enlistment, and that the "recurrence of the same after an attack of measles in service is not such aggravation as would make the disability pensionable." The action was based squarely upon the insufficiency of the evidence to show that he ever recovered from his chronic throat disease before enlistment. It was said that there was nothing in evidence to indicate "that this disability since discharge has been anything more than a periodical recurrence of the weakness of the bronchi, originating in claimant's childhood."

The cases of Jesse Lovel (3 P. D., 187), George H. Stakes (4 P. D., 158), John M. Chandler (4 P. D., 276), and Stephen Horton (7 P. D., 369) distinguish between predisposition to disease and the mere natural aggravation of an already existing disability. In the Lovel case soldier sought pension for an injured right ankle, the result of a sprain. There was no evidence to show any particular incident or accident causing this sprain. It was in evidence, however, in his discharge papers, that he received a compound fracture of the leg about twelve years previous to discharge, "which was not set well," and that hence he complained of weakness and pain in said leg and ankle while

on march or duty. The surgeon diagnosed his disability as due to the fracture, not to any cause in any way connected with his military service.

In the case of George H. Stakes, the soldier wanted pension on account of deafness. The evidence showed that "deafness had been coming on for eighteen years, but has increased much faster since being exposed in the service." This was a well defined case of "mere aggravation in the service of a disease existing prior to enlistment"—a natural development in degree of deafness which would have taken place in any event, without military service.

John M. Chandler was discharged on account of "contraction of the toes of left foot from an incised wound received prior to enlistment." The evidence did not show any cause for the disability incurred in the service—forced marching, assigned by the claimant, not being in any sense a reasonable explanation.

Stephen Horton alleged, in his application, that he had injured his left foot "by his boot rubbing his ankle while on a march." It was shown, however, that soldier had a severe fever in 1852, resulting in a "fever sore," and a suppurative condition of the leg which continued for some years. Some witnesses claimed that the leg became healed in 1860; other witnesses claimed that he had a sore on his leg just before enlistment in 1862. One said that there was a sore on his leg when he enlisted. The surgeon who certified to his disability at discharge reported him disabled "because of an ulcerated leg, which he had a long time previous to entering the service." The doctor "had tried various plans of treatment, but failed to cure permanently or render him fit for duty." Soldier claimed, in his effort to secure pension, that the trouble was caused by his boot rubbing on his leg. The explanation is unreasonable.

The line of demarkation between those cases wherein it has been decided that the claimant is entitled and those in which he is not entitled to a pension is this: mere aggravation in service of a pre-existing disease is not pensionable; but where a disease develops in service, starting with some injury or ailment incident to line of duty as the immediate efficient cause thereof, albeit there is a preexisting tendency, a natural predisposition, to the disease, said predisposition is not a bar to pension.

In the case on appeal, it can not be gainsaid that soldier was predisposed, upon taking cold, to ear trouble, and that his neurotic temperament rendered him more susceptible to epilepsy than he otherwise would have been; but he did not have a specific chronic ear disease at the time of enlistment, and if he ever had a chronic disease of the middle ear, he had recovered therefrom. His acceptance into the service evinced that fact—which is in harmony with the evidence. While in line of duty, as the result of a cold, he sustained an acute

attack of otitis media, which developed to the suppurative stage. A secondary abscess formed in the brain, causing the lesion of which his epilepsy was symptomatic.

The only disease with which we are concerned is the brain lesion evinced by epilepsy. It may be admitted that the tendency to disease of the middle ear and his neurotic temperament predisposed soldier to epilepsy. But under the decisions (and especial reference is had to the Potter and Bruner cases), the widow must be deemed to be entitled to a pension, as epilepsy, it is admitted, caused his death. Epilepsy developed in the service as the immediate sequela of otitis media suppurative, which, in turn, was due to a cold contracted in line of duty. The predisposition to both troubles was present; but the said predisposition is not a bar to the widow's right.

Your action is therefore reversed, and you will readjudicate this claim in accordance with this decision upon the return of the papers.

MARRIAGE AND DIVORCE—VOID MARRIAGE—IMPEDIMENT.

EMMA A. MORRILL (WIDOW).

The evidence clearly shows that the marriage between claimant and Parsons was consummated when Parsons had a living and undivorced wife, and, under the facts in evidence, no common law marriage could possibly have sprung into existence after the death of said wife.

The marriage with Parsons was void ab initio, and claimant's status is the same as if no marriage had ever taken place between herself and Parsons.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
July 21, 1904.*

Emma A., as widow of Charles H. Morrill, formerly a sergeant in Company G, Thirty-fourth Massachusetts Volunteer Infantry, filed her application for restoration April 25, 1900, claim being rejected October 22, 1902. An appeal was filed November 17, 1902.

This claim was rejected under instructions of the Commissioner, as evidenced by the following, which is a copy of a slip over his personal signature:

The claimant's marriage to Benjamin F. Parsons July 6, 1889, is shown by the records of Middlesex County, Mass., and the evidence shows that they lived together in the relation of husband and wife from that time until after November 27, 1896, when the former wife of Parsons died in Wichita, Kans., and the marriage became a lawful one under the laws of Massachusetts, if it was not in fact a lawful marriage when entered into.

During all the time it is proposed to now pension this claimant she was living as the wife of another man, after a marriage to him believed by her to have been lawful.

She married Parsons in 1889, and lived with him until a short time before his death in 1899; and now, when he is dead and no longer able to speak for himself,

upon the evidence presented, she will not be permitted to deny the legality of her marriage to him, simply in order to obtain a pension as the widow of the first husband.

You may reject the claim for restoration on the ground that claimant remarried to one Benjamin F. Parsons July 6, 1889, and lived with him as his wife from that time until a short time before his death in 1899, and she is now his lawful widow and not the widow of the soldier Charles H. Morrill.

This claim has been subjected to a thorough special examination, a considerable number of witnesses have been examined, all of them of most excellent reputation, and the following facts are gleaned from the testimony:

This claimant married Charles H. Morrill at Millbury, Mass., on November 16, 1869, neither of them having been previously married. They lived together as man and wife until Morrill's death on September 17, 1877. She was granted pension under the general law as the widow of Morrill, and this ceased on July 6, 1889, on which last-mentioned date she married one Benjamin F. Parsons. She had known Parsons for about five years, and he represented himself to be a bachelor, but a short time after marriage he informed claimant that he had had a former wife, Sophonia, who died in the State of Maine, in 1862, a child by this first marriage of Parsons also having died at the age of 5 years. About the year 1896 Parsons left claimant, claimant having provided most of the support for herself and husband during their married life, and went to his own family's residence, in the State of Maine, dying there on December 7, 1899.

A little over a year prior to Parsons' death the claimant found a paper in a bureau drawer which appeared to be a partial history of Parsons' life, and contained mention of his having been married at one time to a Mrs. Phillips. Investigation was made at Wichita, Kans., and Charles A. Phillips testified that his mother, Ellen, was born near Catskill, N. Y., and married Peter G. Phillip in the year 1833—witness being born in 1840—Phillip dying in 1847. This affiant lived with his mother in the eastern part of the State of New York, keeping house in Catskill until the fall of 1863, when they went to St. Catharine, Mo., and while there the mother met Benjamin F. Parsons. In the fall of 1863 the mother went to Troy, N. Y., and in the latter part of 1864 married Parsons and the husband and wife went to affiant's home in St. Catharine, Mo. In 1870 Parsons and his wife and affiant moved to Wichita, Kans., and lived there until July 18, 1876, when Parsons and his wife went to Catskill, N. Y. In 1877 Mrs. Parsons returned to affiant's house in Wichita, Kans., and stated that her husband, Parsons, had left her one evening at Catskill, N. Y., without cause or notice and that she had never seen him since. Some years after she obtained some trace of him through his own family, but remained with her son until 1888, when she was taken to the asylum, in Topeka, Kans. She was afflicted with softening of the brain, and died November 27, 1896. This affiant swears that his mother never heard or knew that Parsons had remar-

ried, and that she never obtained a divorce from him. His knowledge is based upon the fact that she lived with him practically all of the time after Parsons deserted her, often talked the affair over, and he was evidently in a position to know had there ever been a divorce anticipated by his mother. An intimate friend of affiant's mother testifies that Mrs. Parsons was never divorced from her husband, and the basis of her knowledge is her intimacy with Mrs. Parsons and a thorough knowledge of her domestic affairs.

Parsons's sisters, brother, and another relative were interviewed, and they unhesitatingly state that the claimant herein married Parsons in good faith. Parsons used to visit them occasionally after his marriage with the claimant, and the sisters and brother accused him more than once of having married the claimant when he had a living undivorced wife. He never denied these accusations, generally remaining silent, although once he remarked that Ellen was dead.

The above is a summary of the evidence in the case, and the law applicable thereto is very easily determined and quickly applied.

It is a universal principle of law independent of statute, although there is a statute in Massachusetts to this effect, that a marriage contracted while either of the parties have a living or undivorced husband or wife is void ab initio.

There is evidence, well-nigh conclusive, that Parsons when he married claimant had a living wife and that she was not divorced from him, either before his marriage to claimant or after. Claimant did not cohabit with Parsons after she discovered the memorandum regarding his former marriage, neither had she for sometime previous, and there was no necessity on her part to obtain an annulment of her marriage unless she saw fit to so do. There was no common-law marriage possible, under the facts in this case, after the death of the second wife of Parsons, and it is evident, without any further discussion that the marriage of claimant and Parsons was absolutely null and void, and that from its very date of consummation. Never having been Parsons's wife she can not now be held to be his widow, and inasmuch as this marriage with Parsons was of no effect whatever, legally, she is unquestionably in the same status that she would have been had the marriage with Parsons never been celebrated; and such status is that of the widow of the soldier Morrill by which she seeks her restoration.

The facts in this case are clear and undisputed, the law applicable thereto is elementary, and it is difficult to discover by what process of reasoning the conclusion was arrived at whereby this claim was rejected on grounds stated.

Action reversed.

DIVISION OF PENSION—PRACTICE—RULE 16—ACT OF MARCH 3, 1899.

WHITE v. WHITE.

Where a claim for division of pension based upon a declaration alleging six months' desertion, under the first proviso of the act of March 3, 1899, was properly rejected on the ground that the statutory desertion of six months was not established, and claimant was subsequently allowed a claim under a subsequent declaration based upon the second proviso of said act, the question of desertion was not in issue under said second declaration, and can not be considered on appeal.

A declaration based upon the second proviso of the act of March 3, 1899, will not justify an allowance of a claim for division of pension under the first proviso of said act.

Rule 16 of Practice does not, and was not designed to, deprive either party of the right of appeal after thirty days; but unless the appeal is filed within thirty day from the receipt of notice of the Bureau action, payments of pension made in accordance with such Bureau action will not be affected by the appeal, in the absence of fraud or mistake of fact.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 21, 1904.*

Mrs. Sarah J. White appealed December 1, 1903, from Bureau action of July 17, 1903, allowing her claim filed April 25, 1903, for one-half the pension of her husband, Casper White, a pensioner under certificate No. 786532, at \$8 per month, wherein the Bureau held that he was an inmate of the Michigan Soldiers' Home, and that she was a woman of good moral character and in necessitous circumstances, and terminating the division of her husband's pension, August 13, 1903, the date on which he was discharged from said Home. Her appeal also involves a prior rejection of a claim filed by her February 17, 1902, wherein the Bureau held, June 26, 1902, that her said husband was not chargeable with desertion for statutory period, and also a prior Bureau adjudication, January 3, 1902, of a claim filed by her May 20, 1901, which was rejected on the ground that she had failed to furnish evidence necessary to show her title under the act of March 3, 1899.

Claimant contends in her said appeal in substance as follows:

First, that her husband deserted her in 1897, and that her subsequent cohabitation with him, temporarily, after she had filed her declaration in 1902 did not break the continuity of his said desertion, as such cohabitation was the result of a trick on his part, under advice of his attorney, in order to defeat her claim.

Second, that in her application in 1903 she had no intention to base her claim on the ground that her said husband was an inmate of a soldiers' home, and merely gave his place of residence in order that the Bureau might be advised as to his address; that this fact should not bar her right to one-half his pension by reason of his said deser-

tion, as more than six months had elapsed since their last colabitation prior to the filing of her said last application in 1903; that under her first application in 1901 she furnished all the evidence called for by the Bureau, including a decree of the court dismissing her husband's bill for divorce and showing that he was the party at fault for the separation.

Pensioner answered the said appeal, contending, in brief, that claimant's first application for one-half his pension was rejected January 3, 1902; her second, June 26, 1902, and her third application was allowed July 17, 1903; that her appeal was not filed until December 1, 1903, and was unauthorized by rule 16 of Practice, which required her to enter her appeal within thirty days from receipt of notice of the Bureau action sought to be appealed from.

He also contends that claimant's allegation as to his cohabitation with her, as alleged, is false, and that her allegation as to her last application is also false, as she was aware at the time that he had left the Michigan Soldiers' Home and was residing with his son.

He also contends that claimant was not in necessitous circumstances.

It appears from the records of this case that claimant filed her first application or declaration May 20, 1901, wherein she alleged that her said husband "is not an inmate of any Home, but he deserted her four years ago and spends his money for drink."

This application was rejected January 3, 1902, on the ground that "she fails to furnish the evidence necessary to show her title under the act of March 3, 1899."

No appeal was taken from this action, but on February 17, 1902, claimant filed a second application wherein she alleged as a basis for her claim for one-half her husband's pension that "he left her last October or 1st of November, 1897."

This application was rejected by the Bureau June 26, 1902, after special examination, on the ground that "pensioner not chargeable with desertion for statutory period."

No appeal was taken from this action, but on April 25, 1903, claimant filed her third and last application, in which she alleged, as the ground on which she based her claim for one-half her husband's pension, that "he is an inmate of the Grand Rapids Home of Michigan."

This claim was allowed by the Bureau July 17, 1903, as hereinbefore stated, and the Bureau action was appealed from by the pensioner and affirmed by this Department September 30, 1903, wherein it was held that—

The question of desertion is not necessarily involved in this case, as the claim was allowed under the second proviso of the act of March 3, 1899. The only question, therefore, for consideration is whether claimant is shown to be in necessitous circumstances, and whether, at the date of filing her application and subsequent thereto, pensioner was an inmate of a State soldiers' home.

Claimant and pensioner were married in 1867. She is 56 years of age, not in good health, and with comparatively a small amount of property. The evidence fairly shows her to be in necessitous circumstances within the meaning of said act.

In reference to the second question, it appears that at the date of filing her said application and up to August 3, 1903, pensioner was an inmate of the Michigan Soldiers' Home. The commandant of said Home reported to the Bureau July 3, 1903, that pensioner entered said Home February 13, 1903, and was still an inmate thereof. Even assuming that pensioner was absent at times on a temporary leave of absence, he would still be held to be an inmate of said Home within the meaning and intent of the act of March 3, 1899.

The question of necessitous circumstances of claimant was fully and carefully considered by the Department in said former appeal and will not be again considered or discussed. That question is now res adjudicata.

Considering now the questions raised under claimant's present appeal, it appears that her first and second applications for one-half her husband's pension were based upon the first proviso of the act of March 3, 1899, which provides that—

In case a resident pensioner * * * shall for a period of over six months desert his lawful wife, she being a woman of good moral character and in necessitous circumstances, * * * the Commissioner of Pensions is hereby directed, upon being satisfied by competent evidence of said desertion, to cause one-half the pension due or to become due said pensioner during the continuance of such desertion to be paid to the wife * * * .

The second proviso to said act is as follows:

That when a soldier or sailor enters into a State home for soldiers or sailors as an inmate thereof one-half his pension accruing during his residence therein shall be paid to his wife, she being a woman of good moral character and in necessitous circumstances, or if there be no wife, then to his child or children under sixteen years of age, or his permanently helpless and dependent child, if any, unless such wife and children shall also be inmates of the same institution or some home provided for the wives and children of soldiers and sailors.

It was therefore incumbent upon claimant to entitle her to one-half her husband's pension under said first proviso to show continuous desertion for six months preceding the filing of her said first and second applications and existing at the date on which said applications were filed.

Claimant testified before a special examiner June 20, 1902, that she had at intervals cohabited with her said husband as his wife ever since their separation; that he would come to her home and she would go to his place for the purpose of cohabitation as husband and wife, and that this had occurred during the winter of 1902.

In view of this testimony, the Department is of the opinion that the rejection of her said first and second application, under said first proviso of said act, was not error, as she had failed to establish a continuous desertion for a period of over six months prior to the date of the filing of either of her said applications.

Claimant's last application was based solely upon the second proviso of said act. Pensioner's desertion of claimant was neither alleged in her said application nor was it necessarily involved in order to entitle her to an allowance.

Where a claim for a division of pension, based upon a declaration alleging six months desertion, under the first proviso of the act of March 3, 1899, was properly rejected on the ground that the statutory desertion of six months was not established, and claimant was subsequently allowed a claim under a subsequent declaration based upon the second proviso of said act, the question of desertion was not in issue under said second declaration, and can not be considered on appeal.

As held in the case of *Medley v. Medley* (12 P. D., 490)—

Where a wife bases her application for a division of her husband's pension on the sole ground that he is an inmate of a State home for soldiers or soldiers, the question of desertion is not involved.

While a declaration alleging desertion under said first proviso may warrant the allowance of a claim under the second or third provisos of said act of March 3, 1899, it by no means follows that the converse of this proposition is true and that a declaration under the second or third proviso will justify the allowance of a claim under the first proviso.

As stated in the case of *Livengood v. Livengood* (13 P. D., 134)—

The first proviso of said act is much broader in its provisions than the second and third provisos and grants one-half the husband's pension to the wife on the ground that he has deserted her for six months, regardless of the fact whether he is or is not an inmate of a State or national home.

A declaration based upon the second proviso of said act will not justify an allowance of a claim for division of pension under the first proviso of said act.

The fact that claimant had alleged desertion in her first and second applications, which were rejected because the statutory desertion was not proved, in no manner aids or enlarges the scope of her third application. The question of an amendment of an application is not involved in this case.

In response to so much of pensioner's contention as relates to the effect of this appeal not being filed within thirty days, as required by Rule 16 of Practice, it is proper to state that said rule does not, and was not designed to, deprive either party of the right of appeal after thirty days. Unless filed within thirty days from the receipt of notice of the Bureau action, payments of pension made in accordance with such Bureau action will not be affected or disturbed by the appeal, in the absence of fraud or mistake of fact, even though said action should on appeal be reversed.

The object of this rule was to secure prompt appeal from Bureau action in case either party had been denied their legal right by any error on the part of the adjudicating officer of the Bureau, either in law or of fact, thus enabling the Department to promptly correct any error upon attention being specifically called thereto in the appeal, and

at the same time continue the suspension of payment of the one-half pension in controversy for thirty days, which was deemed a reasonable time, ordinarily, in which an appeal could be perfected and filed as provided by Rules 17 and 19 of Practice. If at the expiration of thirty days after receipt of notice of Bureau action, no appeal is filed or attempted to be perfected in good faith, the suspension of payment is revoked by the Bureau in accordance with Order No. 69 of Bureau Practice (see appendix to *Bowman v. Bowman*, 14 P. D., 120) and payment is resumed in accordance with the Bureau adjudication in the case.

Another reason for Rule 16 was; to protect the Government against repayment of one-half the pension money in controversy in cases where payments were erroneously made, and to estop the party who by their own laches or unreasonable delay had failed to call attention, by appeal, to the Bureau error.

As stated in case of *Sherman v. Sherman* (13 P. D., 203)—

This rule only limits the right of appeal to the extent stated therein. An appeal may be filed by either party subsequent to the thirty days designated in the rule, but the effect of such appeal, if sustained, would not, in the absence of fraud or mistake of fact, revoke or disturb any payment or division of payments made by the Bureau or its agents under or in accordance with the Bureau action appealed from after the expiration of the thirty days allowed for appeal. The appeal, when filed after the expiration of thirty days from the date on which the appellant received notice of the Bureau action, operates to suspend payment of one-half pension in controversy only from the date on which the appeal to the Secretary is filed in this Department and pending the consideration of the appeal.

While, therefore, a party may appeal from Bureau action at any time, yet if the appeal is delayed for over thirty days, payments found to have been made in pursuance of the Bureau adjudication appealed from, after the expiration of said thirty days, will not, in the absence of legal fraud or mistake of fact, be disturbed.

Claimant's appeal in this case is, therefore, not in violation of Rule 16, although if her appeal had been sustained and the Bureau actions had all been reversed, she could not have recovered the one-half of her husband's pension which had in the meantime been paid him pursuant to said Bureau adjudications prior to her appeal.

The Department is, however, of the opinion that all three of the adjudications by the Bureau in her said claim were justified by the evidence and the law applicable thereto.

Said actions are accordingly affirmed.

**RESTORATION—ACT OF MARCH 3, 1901—FRAUD AND MISTAKE—
EVIDENCE.**

SARAH MATHERS, FORMERLY MILLER (WIDOW).

1. The act of March 3, 1901, predicates title to restoration upon these conditions: (1) That claimant was the wife of soldier during his military service; (2) that pension had been allowed her under the provisions of the general law; (3) that her name was dropped from the roll on account of her remarriage; (4) that said remarriage has been dissolved by death, or by divorce "upon her own application and without fault on her part;" (5) that she is dependent within the meaning of the acts of June 27, 1890, and May 9, 1900. If these essential facts are shown affirmatively, the claimant "shall be entitled to have her name again placed on the pension roll," and it is error to adjudicate the claim *de novo*.
2. In cases where the Commissioner of Pensions, in the exercise of his discretion, has passed upon given facts, has admitted the title of claimant to a pension, and has issued a certificate therefor, it is contrary to public policy for a successor in his office, the material facts being the same, again to place claimant's title in issue, unless there be newly discovered evidence of facts material to said issue, or evidence of fraud, or error in law, or plain mistake of fact—not mistake of judgment in matters involving the exercise of discretion on the part of an officer.
3. Evidence, merely cumulative in its character, is not "newly discovered evidence" warranting the reopening of a claim.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 25, 1904.*

This is an appeal from your action whereby you refuse to restore the name of Sarah Mathers, widow of James Miller, Company F, Fiftieth Indiana Volunteer Infantry, to the rolls under the provisions of the act of March 3, 1901.

The claimant was married to James Miller on September 5, 1850, and lived with him as his wife until June 2, 1866, when he died of bronchitis. On November 3, 1870, she was pensioned under the general law (certificate No. 145972).

On September 1, 1876, she was remarried to one William Mathers. In consequence of this marriage she was dropped from the rolls. William Mathers died July 19, 1899.

On May 9, 1901, she applied for a restoration under the act of March 3, 1901. Restoration was refused on February 9, 1903, on the following stated ground:

Rejection of claim for renewal under the act of March 3, 1901, on the ground of no title, as the soldier's death from bronchitis existed prior to enlistment, as shown by the certificate of disability and by the evidence obtained on special examination. Claimant was originally erroneously pensioned.

The Department construes the above recital of the grounds of rejection to signify that bronchitis, rather than soldier's death, existed prior to enlistment.

On October 8, 1903, she appealed. She claims that she has complied fully with all the requirements of the act of March 3, 1901, and

that she is entitled to restoration. She was put upon the rolls originally "because of her husband's death as a result of disabilities contracted in the service," and she has proved all other things prescribed by the act under which her claim is filed.

The Department is of the opinion that the action adjudicating the claim *de novo* was error. The act in question provides:

That any widow who was the lawful wife of any officer or enlisted man in the Army, Navy, or Marine Corps of the United States during the period of his service in any war, and whose name was placed or shall hereafter be placed on the pension roll because of her husband's death as the result of wound or injury received or disease contracted in such military or naval service, and whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person who has since died or shall hereafter die, or from whom she has been heretofore or shall be hereafter divorced, upon her own application and without fault on her part, and if she is without means of support other than her daily labor as defined by the acts of June twenty-seventh, eighteen hundred and ninety, and May ninth, nineteen hundred, shall be entitled to have her name again placed on the pension roll at the rate now provided for widows by the acts of July fourteenth, eighteen hundred and sixty-two, March third, eighteen hundred and seventy-three, and March nineteenth, eighteen hundred and eighty-six, such pension to commence from the date of filing of her application in the Pension Bureau after the approval of this act.

A claim filed under this act is not an original claim for pension; it is a claim for restoration to a status once enjoyed by the applicant, whereof she was deprived by a single act, that of remarriage. The applicant is not bound to prove all those facts required of her in her original claim. The act predicates her title to restoration ("shall be entitled to have her name again placed on the pension roll") upon these conditions, and upon these alone:

1. That she was the wife of soldier during his military service.
2. That pension had been allowed her under the provisions of the general law.
3. That her name was dropped from the roll on account of her remarriage.
4. That said remarriage has been dissolved by death, or by divorce "upon her own application and without fault on her part."
5. That she is dependent within the meaning of the acts of June 27, 1890, and May 9, 1900.

It can not be disputed that she has responded to all the requirements of the act, and she is therefore entitled to restoration.

Whether her pension should continue is another matter. But the law provides the manner in which her name may be dropped from the rolls. The act of December 21, 1893, provides:

That any pension heretofore or that may hereafter be granted to any applicant therefor under any law of the United States authorizing the granting and payment of pensions, on application made and adjudicated upon, shall be deemed and held by all officers of the United States to be a vested right in the grantee, to that extent

that payment thereof shall not be withheld or suspended until after due notice to the grantee of not less than thirty days, the Commissioner of Pensions, after hearing all the evidence, shall decide to annul, vacate, modify, and set aside the decision upon which such pension was granted. Such notice to grantee must contain a full and true statement of any charges or allegations upon which such decision granting such pension shall be sought to be in any manner disturbed or modified.

This is the only manner in which the widow may be deprived of her pension, once granted, unless she bars her right to further pension by remarriage, which ipso facto strikes her name from the roll. No such notice was given in this case, the reason being that her name is not now upon the roll. The act of March 3, 1901, entitling her to have her name again placed upon the roll, takes no notice of any fact that bars her right to a pension once granted, except her remarriage. That impediment being removed under the specific conditions defined by the act, her name must be restored to the roll. Then, if there be other reasons to bar her right, proceedings must be had in accordance with the law as defined by the act of December 21, 1893. And in the future, in this class of cases, this procedure must be followed.

It is true that under your rules of practice, sanctioned by this Department,

in reviewing claims for restoration the same scrutiny is required as in original ones; and if for any reason it is found that the claim was improperly allowed in the first instance, it should be specially examined or rejected, as the evidence in the case may indicate.

This obviously refers to cases where the pensioner's name was dropped for cause shown—cessation of disability, fraud, adulterous cohabitation, etc. The statutes do not provide in terms the conditions under which such a claimant may be restored to the roll, as it does in the act of March 3, 1901. Where an act of Congress specifically states the conditions under which a person is to be restored to the roll, such act must control. This act simply restores her name to the roll. Then, if there is sufficient cause for depriving her of her pension, another act of Congress provides the manner in which it may be done.

It is true that section 4719, Revised Statutes, provides the manner in which a pensioner may have his name restored to the roll after his failure for three years to claim his pension. It may be that in the adjudication of claims for restoration under this statute you have gone into the merits of the claim *de novo*. It will be noticed, however, that his failure to claim pension is treated by said statute as presumptive evidence that his pension has legally terminated by reason of death, remarriage, recovery from disability, or otherwise—an expression broad enough to include all those things which operate to bar or forfeit pension. In claims for restoration under such circumstances, it is incumbent upon claimant to overcome said presumption; his whole title, *ab initio*, may be involved in the issue. Nothing,

then, is to be inferred from the fact that such a practice has not heretofore been subject to animadversion by this Department.

Even if your procedure in this case was not open to the objections above noted, the Department holds that you erred in the action taken on other grounds.

You refuse her pension on the ground of the existence of soldier's fatal disease prior to enlistment. No fraud on her part is found; no concealment of facts material to the issue; no newly discovered evidence showing the error of the Bureau's former action in allowing her claim—none of these things are found. There are no material facts in evidence in 1903 that were not in evidence in 1870 and in 1876, for the Bureau allowed pension to the minor children after claimant's remarriage. On the same facts you form a conclusion differing from that of 1870 and 1876.

The soldier enlisted October 1, 1861, and was discharged June 24, 1862. The surgeon's certificate of disability for discharge was in evidence when you adjudicated her claim in 1870 and her children's claim in 1876. It shows disability "because of chronic bronchitis contracted before enlistment." Moreover, in 1870, and again in 1876, the testimony of Dr. Joel Vandever was on file. In his affidavit, filed February 5, 1870, he stated that he had been soldier's family physician for twelve years before his death; both before enlistment and after discharge. He testified:

That said James Miller was slightly affected with the bronchitis at the time, and for about two or three years before he entered said service, which was principally caused by attacks of cold, and when the attacks of cold would wear off he would be apparently well again until another such attack, and his health was sufficient for ordinary labor and business, although he could not be called a perfectly sound and healthy man. And after he entered the service the change in way of living and labor, and the exposure to all kinds of bad weather and sleeping in open air and doing guard duty at all hours of night, caused him to contract more and more violent colds, each of which aggravated said disease more or less until it finally overcame his constitution and death was the result. And that he died of said disease on the 2d day of June, 1866. And from all the surrounding circumstances of his case, I am well satisfied that if he had remained at home, following his usual avocations, he would, so far as said disease is concerned, very likely have been alive yet and able to assist his family in procuring a living; and although he would in all probability never have finally recovered from said disease, yet he would with proper treatment have been in all probability living for many years yet. And that said service did, in my opinion, greatly aggravate said disease and hasten his death by many years, I have no doubt.

There is no concealment or evasion here—a square statement of material facts.

There was just one other affidavit in the case, that of Lieut. Isaac A. Craig, who testified:

That James Miller was a corporal in said company; that he enlisted in said service at the time of the organization of said company about the 8th of September, 1861;

that at the time he entered said service he was apparently able for duty, and that he was a good man and made a good soldier, always obeying orders and performing his duty well and cheerfully; and although some soldiers were inclined to shirk duty, he never was. He was put on duty in his turn the same as any other soldier and subjected to cold and wet weather, doing guard duty and marching, etc., and, like the other soldiers, he frequently had to sleep without a tent, and had to eat coarse food badly cooked, for the soldiers of said regiment had but few of the necessary comforts of life while he was in the service. I do not recollect exactly how long it was before he began to fail, but it was after he had served for a considerable time and undergone a good deal of hardship and exposure. He first took cold, which appeared to hang on to him till he would take another and another, and so on, till he finally gave down in health and was unfit for duty, and was honorably discharged from the service on that account about the 24th day of June, 1862. Not being a physician, I am unable to say technically what was his disease, but it was so aggravated by colds brought about, as I believe, by exposure to cold and wet weather, and sleeping in damp places and in open air, that it hastened his death by many years, all of which I am satisfied was without any fault of his, because the fatigues and exposures were incidental to the service at that time and, under the circumstances, he could not have avoided it without shirking his duty. That I know the foregoing statement to be substantially correct and true of my own personal knowledge, except the matter of his discharge, and of that I have been officially informed.

This comprises all the evidence, which is digested upon the face-brief of 1870 and that of 1876.

It is obvious that the Bureau of Pensions adopted the theory advanced in the ingenuous statement of Doctor Vandever, i. e., that while soldier was prone to attacks of bronchitis prior to enlistment, his military service so aggravated the condition, or so set up a chronic condition of bronchial affection, that the soldier's life was materially shortened, and that his death in 1866 was largely, at least, due to his military service.

At the risk of repetition, it may be remarked that these facts were in the case in 1870, and yet pension was allowed; that they were in the case in 1876, and yet pension was allowed to the minor children; and that they were in the case in 1903, and pension was not allowed. Why? Because there were new facts in evidence? There were none. There was, to be sure, new testimony—cumulative in nature, but no new facts. In January, 1903, the case was specially examined and the depositions of claimant, H. R. Miller, Wilson S. Gregory, John Gregory, Cynthia J. Longest, Thomas B. Cummins, Martin H. Tucker, and Robert L. Sloan were taken. All the witnesses save Miller and Wilson J. Gregory testify to soldier's prior soundness; none remember that he coughed, was short of breath, or subject to bronchitis. On the other hand, Miller testified that soldier told him that he was "at times short of breath," before service. He did not cough; never knew him to quit work; no recollection of him being sick prior to enlistment—simply complained of being short of breath at times. Gregory said he was "an ordinary sound man" at enlistment, only he had a hacking cough before service; never knew him to quit work, however; thought at times that consumption or bronchitis was "setting in on him."

Not a single new fact appears in the case now that was not there in 1870. If Gregory thought that bronchitis was "setting in on him" prior to enlistment, Doctor Vandever knew that it was and so testified.

The question now arises as to the justice of disturbing this former action. If there was newly discovered evidence in the case presenting facts which if known in 1870 might have resulted in a different action, or if there was evidence of fraud, there would be no question as to the propriety of reopening the case and reversing the former action. But where action is taken deliberately, with full knowledge of all the essential facts, in a matter addressed to the discretion and judgment of an officer, such action should not be subjected to revision from time to time simply because another officer, in the exercise of his judgment, dissents from the conclusions of his predecessors.

There are many departmental precedents for this position, notwithstanding the fact that the doctrines of *res adjudicata* or *stare decisis*, as such, have never been adopted by the Department.

The same principle is common to the case at bar, and to the case of the minors of Daniel M. Easley (12 P. D., 179).

The widow of Daniel M. Easley was granted a pension under the general law in 1897, the service origin of soldier's fatal disease being accepted. Her pension terminated by her remarriage. An application was filed in behalf of minor children. This claim was rejected because the evidence failed to show service origin of the fatal disease. The claim came to this Department on appeal and your action was reversed.

It was said:

No new facts have come to light since the widow's claim was allowed. Upon the same evidence the judgment of the Bureau in 1897 was that the origin of the soldier's fatal disease in the service was proved, and in 1900 that it was not proved; and because of this difference of opinion the minors are denied pensionable rights while the title of the widow has been conceded.

The evidence has been examined with sufficient care to ascertain that it afforded reasonable ground for the judgment rendered in 1897 in the case of the widow. It is readily perceived that there might be an honest difference of opinion as to whether said evidence established the service origin of the soldier's fatal disease or not, but the question having been adjudicated it should not, in the opinion of the Department, have been subsequently reopened in connection with the minors' claim. Public policy and a due regard for the rights of claimants require that there shall be, at some time, a final decision and an end to litigation. Where an invalid pensioner has died of some disease or disability for which he was pensioned, it would be a manifest hardship to require his widow to reopen and prove his title *de novo* in order to establish her own right to pension; and the same objections apply to requiring a minor to prove title in the widow. Not only would such a rule of practice work great hardship and injustice to claimants, but it would also greatly increase the work of the Bureau and resulting expense to the Government in the adjustment of claims.

Of course, where fraud is shown, or a plain mistake of fact, or error of law, the case would be different. But, in the absence of such showing, the Department is clearly of the opinion that a matter of fact which has been admitted as proved in the claim of a soldier or his widow should not be called in question under a subsequent application filed by the person who succeeds to his or her pensionable rights.

In the case at bar no fraud has been shown. No error of law appears. Nor was there a plain mistake of fact. The facts were unmistakably manifest in 1870 and in 1876. Your position may be that there was a mistake in the Commissioner's conclusions from the facts. But that is a different matter, addressed simply to a former Commissioner's wisdom—the correctness of his judgment in matters appertaining solely to his discretion. Mistake of fact means the overlooking or misapprehension of some fact, material to the issue, not an error in judgment as to the significance of the fact.

Another case, not unlike the one on appeal, is that of Charles F. Borthwick, who was pensioned by Bureau action of June 22, 1867, for gunshot wound of right arm. He was allowed an increase in 1872, again in 1883, and once more in 1886. From the last-mentioned year until 1898 he was receiving \$30 per month. In 1898 his name was dropped from the roll on the ground that he had deserted from one enlistment and that the record had failed to show discharge from said service. He appealed. It appeared that he was specially examined in 1884, at which time he deposed to the facts above stated, regarding his first enlistment and desertion. Yet with these facts in its possession the Bureau not only continued his name upon the roll, but twice thereafter awarded him an increase (the increase from 1883 being allowed in 1884). In the decision in said case (10 P. D., 249) the Department said:

The question of claimant's right to increase of pension having been several times passed upon since 1884 by previous administrations, I am of the opinion that it was error to disturb such action and drop claimant's name from the rolls, because the law, as now construed, would not entitle him to a pension.

The material facts in this case were the same in 1898 as in 1884.

These facts, it will be noted, were in evidence before the Bureau as early as 1884. The Bureau, notwithstanding, neither in 1884 nor in 1886, regarded the facts sufficient to constitute a bar to pension. In 1898, however, a different construction was placed upon the legal effect of these facts.

Continuing, the decision reads:

A long line of decisions, however, are uniform and harmonious to the effect that cases long since adjudicated by previous administrations will not be disturbed for slight or trivial reasons, nor upon any mere matter of opinion as to the weight of evidence, nor upon any matter involving merely an exercise of judgment or discretion, but only when glaring error, mistake, or manifest injustice is apparent from the record or the evidence.

The following cases were cited in support of this principle:

Birney Hoyt (1 P. D., 70); Isaac Sell (2 P. D., 177); Wallace G. Bone (2 P. D., 310); John Burnham (4 P. D., 93); Jackson Martin (7 P. D., 265); Mary E. Eastridge (8 P. D., 5); George W. Amos (8 P. D., 271); James M. Marshall (8 P. D., 395); James Duval (9 P. D., 218); William Wilson (10 P. D., 232).

The same principle was early enunciated in the case of Alfred Kite (9 P. D. (o. s.), 232). Secretary Teller said:

Where the right to pension had been determined by this Office in 1866, and the allowance of the same was not disturbed in the adjudication of applications for increase in 1872 and 1879, and no evidence having been presented to alter the facts as they existed at the time of the original adjudication, or to show that the action then taken was based upon any false or fraudulent representations on the part of the claimant, the propriety of the original allowance of pension should not now be questioned (in a pending appeal for increase).

In the case of Jackson Martin (*supra*), it was said:

Cases long since adjudicated by previous administrations should not be reopened, reconsidered, nor readjudicated, except (1) upon discovery that the pension was procured through fraud; (2) when under the statutes the pension is required to be increased or reduced in accordance with the degree of pensionable disability; (3) when indisputable or manifest error in law or fact is apparent in the record; or (4) when, on presentation of new and material evidence, it is indubitably shown that through mistake the pension was in whole or in part illegally reduced or granted.

The most recent published case is that of Eliza J. Eveland (14 P. D., 141):

Appellant was pensioned under the general law from May 17, 1871, to February 16, 1874, when her name was dropped from the rolls because of her supposed marriage with one Gray. Subsequently the minors' application was rejected on the ground that the widow was still living, her marriage to Gray being declared null and void on the ground that he had a wife living and undivorced at the time of his pretended marriage to claimant. Whereupon the widow applied for restoration, but her claim was rejected on the ground of no record nor other satisfactory evidence showing origin of fatal disease, and no satisfactory evidence of the existence of the same at discharge or for a long time thereafter, and that claimant, though aided by special examination, had failed to establish the claim.

Held: That claimant having once established her claim and having been allowed and paid the pension, that finding can not be legally set aside unless positive affirmative testimony is produced showing fraud, or that the testimony on which the claim was allowed was not true.

The doctrine of *res adjudicata* has been applied by the Department to the reopening of cases on cumulative evidence.

Evidence merely cumulative will not justify a reconsideration of a claim. (Louis Ruch, 1 P. D., 390.)

See, also, James Sconey (1 P. D., 272); John H. Gleason (2 P. D., 106); Widow of Louis S. Lake (2 P. D., 111); Simeon White (2 P. D., 210), and cases cited.

The new testimony in this case is merely cumulative. The testimony of Miller and Gregory does not change the situation an iota. It tends merely to prove that of which there was already better evidence in the case. The certificate of disability and the affidavit of Doctor Vandever, as evidence, are much stronger than the testimony of Miller and Gregory.

The action of rejection is reversed.

Upon return of the papers herewith you will restore claimant's name to the pension roll.

SERVICE—ACT JUNE 27, 1890—TERMINATION OF WAR OF THE REBELLION—VOLUNTEERS.

PLACIDA M. DE ORTEGA (WIDOW).

The termination of the war of the rebellion did not operate as a constructive discharge of volunteers enlisted during said war, as was the case of officers and men in the regular establishment, and the soldier or sailor upon whose service the application is based must be shown to have been honorably discharged from the final contract of service entered into by him during the war of the rebellion.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 25, 1904.*

This is an appeal, filed September 12, 1902, by Placida M. de Ortega, the widow of Jose Ortega, late of Company A, Battalion New Mexican Volunteers; claim No. 654,500.

From the records on file with the War Department it appears that the deceased soldier enlisted in the above-named organization on July 2, 1861, reenlisted as a veteran August 1, 1864, and deserted said service December 26, 1866. May 2, 1902, the Secretary of War refused to remove the charge of desertion and grant a discharge under the provisions of the act of March 2, 1889.

May 14, 1897, the claimant applied for a pension under the act of June 27, 1890, and on February 3, 1898, her claim was rejected by the Bureau, as follows:

Approved for rejection on the ground that the soldier deserted from rebellion service November 26, 1866, as shown by records of War Department.

In the appeal from this action, which was filed September 12, 1902, it is contended "that the soldier's desertion after close of war is no bar to a pension" under the act of June 27, 1890.

In the case of John Norton (9 P. D., 382), wherein the former decisions of the Department were exhaustively considered, it was held:

In claims for pension under the acts of * * * June 27, 1890, * * * an honorable discharge from all enlistments for service in the particular war to which these acts refer is a prerequisite to pension.

In a still later decision of the Department (Anna Hetherington, 10 P. D., 355), it was said:

The first condition of her title to pension under said act (June 27, 1890) is that her husband shall have served ninety days or more in the Army or Navy of the United States during the late war of the rebellion and been honorably discharged; and it has been uniformly held by this Department that soldier must have been honorably discharged from all service contracted to be performed during the war of the rebellion to entitle his widow to a pension under the said act.

In the case at issue it is at once apparent that the soldier was not "honorably discharged from all service contracted to be performed during the war of the rebellion," unless the termination of the war

operated as an honorable discharge at that date, and in such case the subsequent desertion must necessarily have been from some other or different service.

Following the decision of the United States Supreme Court in the case of the *United States v. North* (112 U. S., 510), the Department has made some such a distinction in cases of officers and enlisted men of the Regular Army and Navy. (See cases of William B. Johns, 2 P. D., 393; Helen M. Leslie, 6 P. D., 255; and Evelyn S. Tallman, *ibid.*, 261.)

It is obvious, however, that the distinction thus made is not applicable to the facts in this case. Officers and enlisted men of the regular establishment are commissioned or enrolled for general duty, and any particular war or duty is merely incidental to their general service; volunteers, on the contrary, are enlisted for a particular purpose, and their service relates only to that purpose. In construing laws relating to a particular service, as in this case, the war of the rebellion, it has been found necessary to differentiate in the cases of men of the regular establishment between their general service and their service in a particular war.

The act of June 27, 1890, under which claimant applies, relates solely to service during the war of the rebellion, and one of the prerequisites to a pension under said act is proof of the honorable discharge from said service of the soldier or sailor upon whose service the application is based, and under the decisions of this Department said soldier or sailor must have been honorably discharged from all contracts of service entered into by him during said war, except as provided by the joint resolution of Congress approved July 1, 1902. In the case of regulars, however, the commencement or termination of the war of the rebellion had no effect upon their service, hence it has been held by the Department that the termination of said war operated as a constructive discharge from service "during the war of the rebellion," and that their subsequent service had no relation to the particular service named in that act.

In the case of volunteers no such constructive discharge will be assumed. They were commissioned or enrolled under laws which related solely to the war of the rebellion, or to the use of volunteers during the existence of war, and they were enlisted for service during or in connection with said war. It is true that some of them, as was the case with claimant's husband, were retained in the service after the termination of the war, but they never became a part of the regular establishment, and their retention was due to conditions the outgrowth of the war, and its termination in no wise changed the character of their service. Their discharge followed as rapidly as was compatible with the existing conditions.

Claimant's husband deserted from the last contract entered into by him during the war of the rebellion, and the War Department declines to grant him an honorable discharge. Therefore she, as his widow, is not pensionable under the provisions of the act of June 27, 1890. Rejection is affirmed.

ATTORNEYSHIP—FEE—RULE 18—APPEALS—PRACTICE.

LUTHER C. KANE (CLAIMANT).

PATRICK H. CONEY (ATTORNEY).

When, upon the rejection of a claim for pension, evidence is filed by a contesting attorney, bearing upon the ground of rejection within the time allotted by rule 13 to the attorney of record to file such evidence, the filing thereof inures to his benefit the same as though he himself had performed the service.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 28, 1904.*

Patrick H. Coney, of Topeka, Kans., on December 14, 1903, entered an appeal from the action of the Bureau denying him a fee on the issue of September 18, 1903, in the claim (certificate No. 1049062), for pension, under the general law, of Luther C. Kane, who served in Company K, Fourteenth United States Infantry, war with Spain.

In behalf of the soldier, on January 25, 1899, Butts & Phillips, of Washington, D. C., filed a declaration for pension under the general law on account of disability due to disease of kidneys, result of malaria and anaemia, resulting in chronic cystitis. They filed January 25, 1899, articles of agreement stipulating for the payment of a fee of \$25, and on November 1, 1899, and January 9, 1900, filed evidence. A medical examination was held March 14, 1900. The claim was rejected September 20, 1900, upon the ground of no pensionable disability shown since date of filing due to disease of kidneys, malaria, anaemia, or cystitis. Messrs. Butts & Phillips were advised October 3, 1900, of this action.

The appellant, December 5, 1900, filed another declaration in the claim which contained a power of attorney in his favor, and in which cystitis and anaemia as results of malarial fever were alleged as of service origin. On the same date he filed articles of agreement stipulating for the payment of a fee of \$25. He filed January 9, 1901, the evidence of two physicians showing treatment and existence of cystitis.

Messrs. Butts & Phillips, also, on March 7, 1901, filed evidence the same as adduced by appellant.

A medical examination was held February 12, 1902. The Bureau, March 20, 1902, adhered to its adverse action upon the ground that the additional evidence did not outweigh the report of the board of

examining surgeons. Of this action Messrs. Butts & Phillips were not advised. The claimant was notified thereof on March 25, 1902, and again on April 17, following.

The appellant on May 16, 1902, entered an appeal from the action of the Bureau in rejecting the claim, and on July 28, 1902, filed evidence to make the claim special. The Bureau receded from its adverse action and the appeal was dismissed August 1, 1902.

Certificate issued September 18, 1902, to allow pension under the general law at the rate of \$6 per month on account of disability due to disease of bladder from January 25, 1899, date of filing declaration by Messrs. Butts & Phillips. On this issue a fee of \$25 was certified to Mr. Coney. He has been required to refund the same in favor of Messrs. Butts & Phillips, hence this appeal.

Messrs. Butts & Phillips, who were the original attorneys in the claim, were in good standing when the claim was rejected on September 20, 1900, of which action they were advised October 3, 1900. Under rule 13 of the rules of practice they were entitled to ninety days from October 3, 1900, in which to file a motion for reconsideration to reopen the claim sustained by evidence or to enter an appeal to this Department. Within their allotted time they took no action whatever. However, the appellant within the period filed medical evidence bearing upon the ground of rejection, and, under the decisions of the Department this service inured to the benefit of Messrs. Butts & Phillips. Several decisions by this Department are to the effect that when service is rendered by one attorney within the time allotted to the attorney of record to perform such service, the service rendered by the former inures to the benefit of the latter. (Catharine S. Leighton, 7 P. D., 88; Amelia L. Brewster, 7 P. D., 296; Malvin B. Whitehead, 7 P. D., 427, syllabus; 428, text; Martha J. Craiglow, 7 P. D., 517, and Albert Huber, 8 P. D., 80.) The case of Malvin B. Whitehead, *supra*, is directly in point. In the case of Albert Huber, *supra*, the Department held that—

When an appeal from the rejection of a case is filed in the time allotted by rule 13 to the attorney of record, it inures to his benefit the same as though he himself had taken such action.

By rule 13 ninety days are allotted to an attorney from date of notice of rejection in which to file evidence looking to a reconsideration or reopening of the case, or in which to enter an appeal. It is in strict accord with the rule laid down in the Huber case, *supra*, to hold that the filing, by an attorney, of evidence within the time allotted by rule 13 to the attorney of record in which to file such evidence would inure to his benefit.

As the filing of evidence by appellant to reopen the claim inured to the benefit of Messrs. Butts & Phillips for the reason that it was filed within their time, they were entitled to notice of the action of the

Bureau of March 20, 1902, adhering to its adverse action; they were never advised thereof. Notice was sent to the claimant, but notice to him was not notice to them (Calista M. Hardy 7 P. D., 391). There was, therefore, no date from which their allotted time, under rule 13, could run in which to enter an appeal from the action of the Bureau of March 20, 1902. They were in good standing when the appellant, on May 16, 1902, entered such an appeal which, under the recited rule, inured to the benefit of Messrs. Butts & Phillips. As this was all that was required to secure a favorable action, so far as the service of an attorney is concerned in the prosecution of the claim, there remained nothing further for them to do. They were, therefore, in good standing when the claim was allowed and were entitled to the fee. Under the recited conditions the power of attorney in favor of the appellant never became operative by reason of the prior rights of Messrs. Butts & Phillips and upon that ground he was properly denied a fee.

The appellant states that Messrs. Butts & Phillips were in default when he appeared in the claim on December 5, 1900. It appears, as has been shown, that they were then in good standing. He also states in effect that the claim filed by Messrs. Butts & Phillips was based on four causes of disability alleged by them while the claim filed by him was based but upon one. If such were the facts it is immaterial. The facts are that the claim filed by Messrs. Butts and Phillips was based on a strict construction upon a single cause, while in the declaration filed by appellant two causes of disability were alleged. He further states that it was not obligatory upon the part of the Bureau to advise Messrs. Butts & Phillips of its action rejecting the claim. His attention is invited to the first provision of rule 13 of the rules of practice before the Commissioner of Pensions which reads—

Upon the rejection of a claim for pension or bounty land the duly constituted attorney of record shall be notified of such rejection and the reason therefor. * * *

and to the decision of the Department in the case of Charles H. Larned (7 P. D., 162).

Appellant contends that it is through error on the part of the Bureau that Messrs. Butts & Phillips have title to the fee if at all. Said attorneys are entitled to a fee under the well and long established rules of practice. It was through error of the Bureau that appellant was recognized in the case in the first instance.

Appellant cites several decisions of the Department none of which is in point.

Action affirmed.

HELPLESS MINOR—ACT JUNE 27, 1890—SPECIAL ACT.

MATTIE GRAZIANI (WIDOW).

The claimant's name having been placed on the rolls subject to the provisions and limitations of the pension law, by special act, she is entitled to the two dollars increase provided for in the third section of the act of June 27, 1890, if the minor on whose account claim is made is shown to be helpless.

The evidence in the claim making out a prima facie case, the papers are returned for special examination and medical examination on the question of the minor's helplessness.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
January 30, 1904.*

Mattie, as widow of Lawrence L. Graziani, formerly private in Company A, Third United States Cavalry, was pensioned by a special act of Congress, approved June 25, 1888. The act referred to is in the following terms:

Be it enacted, etc., That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll, subject to the provisions and limitations of the pension law, the name of Mattie (Graziani, widow of Lawrence L. Graziani, late of Company A, Third Regiment United States Cavalry.

In accordance with the above act the widow and present claimant was granted a pension of \$12 per month and \$2 per month additional for each of four minor children.

November 18, 1899, the widow made application under the act of June 27, 1890, on a blank form provided as a "Declaration for soldiers' children who are permanently helpless." This appears to have been treated by the bureau as an application by the widow for a continuance to her of the \$2 per month additional on account of said minor. This is held to have been proper, although strict rules of pleading would deprive her of any right under such a declaration, for the application for the continuance should properly be made by the widow in her own right.

This claim was rejected February 12, 1900, in the following stated language:

Approved for rejection on the ground that the child, Effa B., is not insane, idiotic, or otherwise permanently helpless.

November 22, 1901, appeal was filed from the above action, contending that the same was erroneous, and that the helpless child should have been medically examined at least.

When the papers were transmitted to the Department in response to the appeal, the Bureau made the following suggestion:

The appeal should be dismissed to enable the Bureau to reject the claim on the proper ground. The widow has no title to increase for an alleged helpless minor because she is pensioned under a special act.

The appeal was not dismissed, but the claim was returned for readjudication and report on January 26, 1903.

The claim was again rejected March 6, 1903, in the following stated language:

Approved for rejection on the ground that claimant is pensioned under a special act of Congress which carries with it no title to continuance of increase on account of minor child who may be insane, idiotic, or otherwise permanently helpless.

The papers are now before the Department for consideration of the merits of the claim on both questions presented. It is true the appeal only relates to the action of rejecting the claim on the ground that the minor was not in the helpless condition mentioned in the statute, but as the papers in the case have been returned by direction of the Department, the justice of the Bureau action in rejecting the claim on the ground that the widow has no title to continuance of the \$2 per month on account of the minor because she was pensioned under a special act will be considered.

As pointed out above, the special act granted the widow a pension "under the provisions and limitations of the pension law." Consequently the widow was granted \$16 per month, \$2 of which pension was dropped as each child became 16 years of age, all of the children reaching that age before 1903. The \$12 per month granted the widow was her own pension as well as the \$2 additional for each child.

Section 4703 Revised Statutes is in part as follows:

The pensions of widows shall be increased from and after the twenty-fifth day of July, eighteen hundred and sixty-six, at the rate of two dollars per month for each child under the age of sixteen years of the husband on account of whose death the claim has been, or shall be, granted.

The third section of the act approved June 27, 1890, is as follows:

That if any officer or enlisted man who served ninety days or more in the Army or Navy of the United States during the late war of the rebellion, and who was honorably discharged has died, or shall hereafter die, leaving a widow without other means of support than her daily labor, or minor children under the age of sixteen years, such widow shall upon due proof of her husband's death, without proving his death to be the result of his army service, be placed on the pension roll from the date of the application therefor under this act, at the rate of eight dollars per month during her widowhood, and shall also be paid two dollars per month for each child of such officer or enlisted man under sixteen years of age, and in case of the death or remarriage of the widow, leaving a child or children of such officer or enlisted man under the age of sixteen years, such pension shall be paid such child or children until the age of sixteen: *Provided*, That in case a minor child is insane, idiotic, or otherwise permanently helpless, the pension shall continue during the life of said child, or during the period of such disability, and this proviso shall apply to all pensions heretofore granted or hereafter to be granted under this or any former statute, and such pension shall commence from the date of application therefor after the passage of this act: *And provided further*, That said widow shall have married said soldier prior to the passage of this act.

It will be noted that in both these laws the \$2 additional for each minor is part of the widow's pension. Such money was not paid to

the minors, but to the widow of the soldier on their account. The minor's right is to the whole of the pension, after the death of the widow. (See section 4703 Revised Statutes, and also cases of minors of William Hackey, 7 P. D., 212; minors of Hartwell Trickey, 8 P. D., 84.)

In the case of the minors of Hartwell Trickey (8 P. D., 84), it was held:

The fact that the alleged widow of the soldier was pensioned by special act of Congress and the certificate included pension for herself and her minor children does not confer title upon said children to a continuance of such pension to them after her death, the special act having reference only to title in said alleged widow.

It follows that when the widow was granted pension under the special act it was granted to her. The language of the third section of the act approved June 27, 1890, also leaves no room for doubt but that the two dollars additional pension, and the continuance of the same on account of the helplessness of a minor was also a payment to the widow, and not to the minor in its own right.

In the case of Catherine Lott (5 P. D., 382), the Department held:

The sum of \$2 per month, as provided in section 3 of the act of June 27, 1890, for each minor under 16 years of age, is not set apart for each minor child; it is not the minor's pension during the lifetime or the widowhood of the mother, but it is to be paid to the mother as a part of her pension as widow so long as the child is under 16 years of age.

In the case of Sarah L. Zimmerman (8 P. D., 429), the Department said:

During the life of the widow pensioner, not married, no minor has any pensionable rights, and the only allowance that can be made on account of a helpless minor under the act of June 27, 1890, in such a case is the continuance of the \$2 increase to the widow, and she alone can apply for and obtain it. Commencement of increase of a widow's pension on account of an insane or helpless minor must be from the date of filing a proper application by the widow, and cannot date from the filing of a power of attorney from the widow.

(See also the case of minors of William F. Pettitt, 8 P. D., 306.)

The widow's name in this case was placed on the rolls subject to the provisions and limitations of the pension law. One of the provisions of the pension law is that she shall have, upon her application, \$2 a month additional pension during the life or disability of a helpless minor. She is as much entitled to her increased rating for such child as she was to the original grant of \$2 on said child's account during minority.

Turning now to the question of the helpless condition of the minor, it appears from an examination of the papers that when the claim was rejected in February, 1900, on the ground that the minor was not insane, idiotic, or otherwise permanently helpless, it was so rejected without a physical and medical examination of the minor because a *prima facie* case of helplessness was not made out by the evidence

submitted. Since the date of that rejection the affidavit of Dr. James P. Riffe and the joint affidavit of Sallie N. Newhall and Mary E. Dalheim have been filed and a prima facie case of helplessness is presented, notwithstanding dicta to the contrary in the opinion of this Department dated January 26, 1903.

Accordingly the action of the Bureau in rejecting the claim of the widow for continuance to her of \$2 per month on account of the alleged helpless minor on the ground that she has no title to the same, though the minor were helpless, is reversed.

The action of rejecting the claim on the ground that the minor was not shown to be in the helpless condition specified in the third section of the act of June 27, 1890, is also reversed, and the papers are returned in order that a special examination may be had to determine whether the minor was helpless when she became 16 years of age and has continued so until the present time, and also that she may be medically examined to determine her physical condition at this date. The claim should then be readjudicated in accordance with the evidence and this opinion.

DIVISION OF PENSION—ACT OF MARCH 3, 1899—EVIDENCE.

CRISSEY *v.* CRISSEY.

The evidence in this case, filed by pensioner as a basis for reopening of claim, is not newly discovered, but is mainly cumulative in character, and the affiants and pensioner testify to a legal conclusion rather than to the facts upon which they base their conclusions.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, February 4, 1904.

Elias Crissey, a pensioner under certificate No. 77206, appealed, by J. C. Lowry, his attorney, December 28, 1903, from Bureau action of December 9, 1903, wherein it was held that the evidence filed by pensioner since the allowance of the claim could not be held to offset the merits of the claim to the extent of justifying a recommendation for its reopening.

It is contended, in brief, that the testimony of fourteen witnesses filed by pensioner is sufficient to disprove the claim of the wife, Elizabeth, for one-half his pension; that as he was delayed by illness from sooner presenting said evidence, it should now be accepted as sufficient to reopen the claim and secure an adjudication in his favor; that he should not be prejudiced by his illness.

In answer to said appeal, claimant, by her attorney, H. S. Berlin, contends that pensioner was allowed ample time in which to interpose his defense; that he had been tried for desertion and nonsupport in a court of competent jurisdiction and found guilty, and that the Bureau

action allowing the wife's claim was based in part upon said judicial proceedings, and was affirmed by the Department on appeal.

The main question to be determined in this appeal is whether the Bureau has exercised a sound and just discretion in declining to recommend a reopening of the case upon the supplemental testimony filed.

Pensioner, by his attorney, J. C. Lowry, filed in the Bureau, December 7, 1903, five affidavits, and asked that the claim of his wife for one-half his pension be reopened and readjudicated, contending that he had been prevented by illness from sooner furnishing said testimony.

Pensioner testified in his affidavit that on September 2, 1903, the Bureau informed him of the substance of the testimony filed against him by his wife, and allowed him fifteen days to file additional evidence in defense of his pension; that during this time and up to the time he filed his appeal he was seriously ill and unable to get away from home to secure the required evidence.

It appears, however, that pensioner was fully advised of the nature and character of his wife's said claim for one-half his pension on the ground that he had deserted her without just cause, in 1897, and that he would be allowed thirty days to file evidence to rebut any or all of the allegations made by claimant. This notice was received by pensioner July 16, 1903, as appears from his registry receipt card of that date. On July 30, 1903, he filed his affidavit in defense of his wife's claim, but he made no reference therein to his ill health and requested no extension of time in which to file further testimony. On August 17, 1903, he sent a lengthy letter to the Bureau in which he opposed the allowance of his wife's claim, and in this letter, as in his affidavit, he made no complaint of ill health and requested no extension of time in which to file further testimony. On September 12, 1903, he filed the joint affidavit of two witnesses as to certain alleged admissions made by claimant in 1897, the date on which it was alleged the separation and desertion occurred.

Pensioner's present contention that he was prevented from interposing his defense because of illness and lack of time does not appeal strongly to the Department, in view of the foregoing record.

The wife's claim was not allowed by the Bureau until October 1, 1903, and instead of then applying to the Bureau for a reopening and readjudication of said claim, pensioner appealed to the Department November 2, 1903.

The appeal and the contentions of appellant, as well as all the evidence in the case, were carefully considered by the Department, and the Bureau action appealed from was affirmed November 28, 1903. After said decision had been reached, but evidently before he received a copy thereof, pensioner forwarded to the Department the additional testimony subsequently filed by him with the Bureau, and he was advised that additional evidence upon the merits of the claim could

not be considered by the Department on appeal, and his attention was invited to Rule 19 of Practice, and the supplemental affidavits were returned to him with the information that his remedy was by application to the Bureau to reopen his case. He thereupon filed said affidavits in the Bureau December 7, 1903, as aforesaid, with the result heretofore stated. These affidavits will now be considered.

Pensioner in his said affidavit testified that:

On September 2, 1903, the Bureau of Pensions wrote him and informed him that his wife had filed the testimony of several witnesses, reported credible, tending to show that your affiant deserted her because she objected to his association with a common woman, and that affiant left her without any fault on her part in the year 1897, etc., and allowing your affiant fifteen days from the receipt of such letter to file additional evidence in defense of his pension, etc. That during this time and up to the time that your affiant asked for an appeal he was seriously ill and suffered great bodily pain, so much so that he was unable to get away from home to secure the evidence required or in any other way get it.

It is to be noted that pensioner did not allege or pretend in said affidavit that he had a meritorious defense to his wife's claim upon the merits, and for reasons already stated it does not appear that his illness deprived him of the right to interpose his defense at the proper time.

The next affidavit is subscribed by four witnesses who testify:

That they are acquainted with both Elias Crissey and Elizabeth Crissey, his wife, and that they knew them at the time they separated, and that Elias Crissey did not desert his wife, but that she voluntarily and willfully deserted him and went away from the home that he had provided for her.

Further, that they know Elias Crissey's neighbors; that they know his reputation among his neighbors for chastity, and that it is good.

In this affidavit the witnesses testify to a legal conclusion rather than the facts upon which the legal conclusion could be based. As stated in the case of *Davis v. Davis* (10 P. D., 236-237):

Certainly it is not seriously intended to accept a mere recitation by some person or persons who may or may not be interested, under oath, that "claimant's husband deserted her," as sufficient proof of the fact of desertion.

So, on the other hand, their testimony that the husband did not desert his wife is not proof of the fact, but is a legal conclusion. As was held in the case of *Harris v. Harris* (12 P. D., 7-9), where the effect of affidavits similar in character to the one here under consideration was involved:

The foregoing affidavits are open to the objection that they state legal conclusions rather than the facts necessary to establish the legal conclusion.

It is for the Bureau to first decide, in claims of this character, whether the facts proved establish desertion—it being a legal question; and witnesses can not usurp the functions of the Department or relieve the Bureau of its duty by testifying that one party deserted the other without cause. Witnesses should testify to the facts and circumstances attending the alleged desertion, showing an absence of any cause which would justify one party from abandoning the other. (See 1 Wharton, *Law of Evidence*, paragraph 507.)

When a witness testifies that one party deserted or did not desert the other, he testifies to a legal conclusion of law rather than to the facts which constitute the legal status. Desertion implies an intent to desert or abandon, and in order to enable the Bureau or this Department to determine whether the acts or omissions of a party constitute desertion, the acts or omissions of the party or parties and their conduct and expressions should be shown. These constitute the facts of the case, and the evidence should be confined to the facts and not to the law, which is but the legal conclusion to be deduced from the facts. When, therefore, the affiants testified that pensioner did not desert claimant, they testified to a legal conclusion and not to a mere fact. (See, also, *Pick v. Pick*, 13 P. D., 299-300.)

So also the testimony of these four affiants that pensioner's reputation for chastity is good, does not prove that because his reputation was good in 1903 that it was good in 1897, when it is charged that he associated with a woman of bad repute, and that he deserted his wife and was convicted of the offense and sent to jail.

The next affidavit is signed by four affiants, who testify merely that they know pensioner's reputation among his neighbors for chastity, and that it is good.

The next affidavit, signed by four affiants, is in substance the same as the foregoing.

The next and last affidavit, signed by two witnesses, is as follows:

That they are acquainted with both Elias Crissey and Elizabeth Crissey, his wife. That at the time of the separation of the parties they were both residents in their neighborhood.

That at that time during the absence of the said Elias Crissey, while he was employed at his work as a laborer, and while he was yet living with his said wife, Elizabeth Crissey, she came to them and proposed to sell and asked Ezra Geiger to buy the heifer belonging to her said husband.

That they are well acquainted with the said Elias Crissey, and that they know his reputation for chastity, and that it is good as far as their personal knowledge is concerned.

All the facts testified to by the foregoing affiants and pensioner may be conceded, yet they do not reach the main question or prove that pensioner did not desert his said wife in 1897, as alleged by her, and as fairly established by the evidence in the case, or that his reputation for chastity was good in 1897. So far as they relate to facts they are mainly cumulative.

The Bureau therefore very properly declined to recommend a reopening of the case.

Rule 3 of Practice provides that an appeal will not be entertained until all attainable evidence has been filed in the Bureau, and a decision had thereon. When, therefore, a party, under the act of March 3, 1899, appeals from a Bureau action it is to be assumed that he has filed all

obtainable evidence before the Bureau prior to the Bureau action complained of.

The refusal of the Bureau to recommend a reopening of this claim on the testimony filed by pensioner December 7, 1903, was not error, and said action appealed from is accordingly affirmed.

DIVISION OF PENSIONS—ACT OF MARCH 3, 1899—SPECIAL EXAMINATION—CONSTRUCTION.

NUTT v. NUTT.

The evidence in this case fails to establish the fact that claimant was, at the date of filing her application, a woman of good moral character.

Good moral character is established, *prima facie*, by proof of good reputation by witnesses who know the general reputation of the claimant, but this *prima facie* proof is outweighed by proof of acts of such immorality as are wholly inconsistent with good moral character, and when such acts took place prior to the passage of the act of March 3, 1899, the question as to whether the testimony is too remote is one of discretion.

The act of March 3, 1899, is in no sense a penal statute, yet in ascertaining the beneficiaries under the grant of one-half of a pension which has been allowed, the act is strictly construed.

Neither the beneficiaries under said act of March 3, 1899, nor the pensioners are entitled, as a legal right, to a special examination, but when a special examination is ordered in a claim under the act, both parties or their attorneys are entitled to due notice thereof, unless the examination is directed through the criminal section of the Bureau, or for the purpose of securing evidence on which to base or prosecute a civil or criminal case.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, February 17, 1904.

Mrs. Effie Nutt, by John W. Martin, her attorney, appealed December 28, 1903, from the Bureau action of November 17, 1903, rejecting her claim filed August 12, 1903, for one-half the pension of her husband, James S. Nutt, a pensioner under certificate No. 1007915, wherein the Bureau held that she was not a woman of good moral character.

It is contended in behalf of appellant, in brief, that for the last twenty years, and for fifteen years prior to the passage of the act of March 3, 1899, claimant has been shown to be a woman of good moral character, and reference is made to the affidavits of five of her witnesses who have so testified; that the inquiry as to good moral character, like the question of desertion, should be limited to the period subsequent to March 3, 1899. It is further contended that a party can not be prosecuted for a statutory offense committed prior to the act of March 3, 1899; that said act is in the nature of a penal statute, and as such should be strictly construed, and also, that as claimant's attorney was not notified

of the special examination, and claimant was given no opportunity to consult her attorney, the claim should be reopened and action reversed.

The contention of claimant's attorney, so far as it relates to the *ex parte* proceeding on the part of the special examiner, appears to be justified, as there is nothing to indicate that any notice was served upon either claimant or her attorney of said examination. It is true that the special examination was ordered by the Bureau for the purpose of testing the credibility of two witnesses who had testified on the part of pensioner, and adverse to claimant, but this is no reason for neglecting to notify claimant and pensioner, or their attorneys, and affording them an opportunity to appear in person or by attorney and to cross-examine the witnesses before the special examiner.

While neither party is entitled to a special examination as a matter of right (see *Buck v. Buck*, 14 P. D., 150), yet when a special examination is ordered, as in this case, notice to the parties should be given, unless the examination is directed through the criminal section of the Bureau, or for the purpose of securing evidence on which to base or prosecute a civil or criminal case. See departmental decision of July 31, 1901, in the case of *Hughes v. Hughes*, docket No. 69046, certificate No. 4976, wherein it was stated:

As indicated in the cases of *Ellis v. Ellis* (11 P. D., 288) and *Blanchard v. Blanchard*, certificate No. 146571, docket No. 74997, decided February 23, 1901 (L. B. No. 406, p. 277), notice to both parties in cases under the act of March 3, 1899, is jurisdictional, that said act is to be construed in *pari materia* with the act of December 21, 1893.

As the pensioner in this case had no notice of the special examination of claimant and her witnesses, and did not appear or waive his right to be present, cross-examine witnesses, and introduce evidence in his own behalf, the action appealed from, based on said *ex parte* testimony, is reversed, the case reopened, and another special examination is ordered, when pensioner should be apprised of the testimony taken and be given the opportunity to cross-examine the witnesses and to introduce evidence if he so desires.

Notice of the examination in this and all other similar cases under said act will be duly served upon both the claimant and pensioner, or their attorneys, unless service of notice is waived.

If the Bureau action in this case depended upon the testimony obtained on said special examination, the Department would return the papers for a special examination, with due notice to both parties of the time and place of taking the same, and in considering the question as to whether the Bureau action was or was not justified by the evidence, the special examination and the testimony taken thereunder will be excluded from consideration.

In answer to so much of the appeal as is based upon the assumption that the act of March 3, 1899, is in the nature of a penal statute and should, therefore, be strictly construed, it may be stated that, in the opinion of this Department, said act is in no sense a penal statute. It neither commands nor forbids the doing or omission of any act on the

part of the pensioner or beneficiary. It prescribes no penalty and imposes no punishment. It simply designates certain conditions under which a pension already granted may be divided and diverted into another channel, and designates the person or persons who, under certain conditions, shall receive one-half of the pension money due or to become due the pensioner. Congress has the power to impose such terms and conditions on the pensioner as it may see fit. It may reduce, increase, create, or terminate a pension, and designate the beneficiaries who may participate in the benefits conferred upon the pensioner. In designating the wife who may, under the conditions named in the act of March 3, 1899, receive one-half the pension of her husband, Congress saw fit to limit said division to the wife who is a "woman of good moral character," and to still further limit the benefit to the wife who is "in necessitous circumstances." If the wife of a pensioner who has been deserted by her husband, or whose husband is an inmate of a State or National home for soldiers and sailors, is not a "woman of good moral character," or if she is not "in necessitous circumstances" she is not the beneficiary named or designated in said act, and is therefore not brought within the purview of the granting portion of the act or entitled to its benefits.

While the act is in no sense penal, yet in ascertaining the beneficiaries it is strictly construed, and none are entitled unless they bring themselves within the strict letter and intent of the law. When, however, the beneficiary has been ascertained, then a liberal construction is allowable for the purposes of conferring the benefits of the act. This is the general rule of construction applicable to grants and remedial statutes. (Sutherland on Statutory Construction, paragraphs 378, 410, and 458.)

When, therefore, the Bureau rejected claimant's application under said act of March 3, 1899, upon the ground that she was not a woman of good moral character, she was in no sense being prosecuted for a statutory offense.

As stated in the case of *Christopher v. Christopher* (13 P. D., 383):

The act of March 3, 1899, grants one-half of a husband's pension to the wife upon certain conditions enumerated in the act, she being a woman of good moral character and in necessitous circumstances. Both the character of the claimant and her financial or necessitous circumstances are, therefore, material allegations in her application under said act, without which the application would be defective. The question of "good moral character," being a material fact, should be supported by direct and affirmative evidence, and is not satisfactorily established by the general legal presumption that all persons are presumed to be of good moral character. The act of March 3, 1899, by limiting the beneficiaries to wives of "good moral character" recognizes the fact that all wives are not of that class, hence the limitation to those who should establish the fact by satisfactory evidence that they belonged to the class designated. Her character is a fact to be proved. The rule, therefore, in civil actions, that the plaintiff is not required to introduce evidence of good character until it has been assailed by the defendant, and that "in the absence of proof to the con-

trary a person's character is presumed to be good," is not applicable to claims on behalf of the wife of a pensioner under the act of March 3, 1899.

The act of March 3, 1899, like statutes giving a remedy to "females of good repute," or a woman "of previous chaste character," requires affirmative proof of character.

In the case under consideration claimant's good moral character is not only put in issue by the statute, but pensioner asserted and offered evidence to show that she was not of good moral character, but was guilty of adultery with one Johns prior to the alleged desertion, and that she gave birth to an illegitimate child which was the cause of pensioner's refusal to live with her.

Claimant, in an affidavit filed October 17, 1903, testified as follows:

I do acknowledge that I have given birth to one illegitimate child since his (pensioner's) discharge from prison. The child was born May 10, 1886, * * * with the exception of the one misstep I have always lived a virtuous life.

Claimant filed the affidavits of six affiants in 1893 who testify that she "is a woman of good moral character." Two of said affiants testified that claimant had always borne the reputation of a woman of good moral character.

Pensioner testified in an affidavit filed September 10, 1903, that upon the expiration of his term of imprisonment in 1883 he returned to claimant, intending to live with her, but that on his return home he found her in bed with a child a few days old whom he knew not to be his, and he thereupon left her for good, since which time she had given birth to two more illegitimate children.

He also filed the affidavit of one Lewis Johns who testified October 6, 1903, to his illicit relations with claimant for the last fifteen years. Also the affidavit of Mrs. Susie White, who testified October 8, 1903, that she was acquainted with claimant about six years, "long about 1888;" that claimant kept company with men other than her husband and had a child whose father, claimant said, was Lewis Johns, and that claimant was a woman of bad character, who would be called a common prostitute.

It is contended by the attorney for claimant that:

A certain disreputable character by the name of Johns who, for whisky or other like considerations, was induced to make an affidavit that he had lived in adultery with the claimant for years, when the facts are that by reason of having no other place to live she made her home with Johns' mother who was her aunt, but never at any time sustained any adulterous relations with Johns, whose reputation for truth is so bad, and whose character is so low that the special examiner did not take his deposition.

There is, however, no testimony impeaching the reputation of the witness, Johns, for truth and veracity, while Mrs. White is reported as credible.

While the question of good moral character, under the act of March 3, 1899, relates primarily to the character of the claimant at the date of filing her application, it is pertinent and often necessary to consider

her conduct prior thereto and even prior to the passage of said act, for if a course of conduct on her part is shown incompatible with good morals, if prior to March 3, 1899, she is shown to be living an immoral life, thus showing her character to be immoral, no change of character can, in the absence of proof, be presumed.

While the statutory desertion designated in said act is six months continuous desertion since the passage of the act, yet in a large number, if not a majority of cases, the original act of desertion occurred many years prior to the passage of the act; but as desertion is a continuous act, if it is shown to continue six months subsequent to March 3, 1899, it becomes such desertion as is designated in the act of Congress, regardless of the length of time that had elapsed since the desertion first took place.

So character once shown to be bad is presumed to so continue until the contrary is shown, or a change has occurred, or facts established from which the law presumes a change of character.

As stated by Greenleaf on Evidence (Vol. 1, par. 41):

When, therefore, * * * a state of things is once established by proof, the law presumes that the * * * state of things continues until the contrary is shown, or until a different presumption is raised from the nature of the subject in question. (*Parkhurst v. Ketcham*, 6 Allen, 406; 83 Am. Dec., 639-640.)

The question as to whether the testimony is too remote in point of time is largely one of discretion in each particular case. (Fifth Am. and Eng. Ency., 2d ed., p. 883.) In *Teere et al v. Huntingdon* (22 How., U. S. 2) five years was held to be too remote. In *Parkhurst v. Ketcham*, supra, ten years, and in *State v. Espinozer* (20 Nev., 209) fifteen years was held not to be too remote, while in the case of *State v. Parker* (96 Mo., 383) twenty years; and in *Turner v. King* (98 Ky., 253) sixteen years was held to be too remote.

It is further argued by claimant's attorney that by the term "character" is meant reputation or the estimate which is put upon a person. (Citing Webster's Dictionary, defining the word "character.")

The supreme court of Iowa in the case of *Andre v. State* (5 Iowa, 389, 68 Am. Dec., 708), in construing the word "character" in the code providing certain penalty for seduction of a woman "of previously chaste character," used the following language:

The words "character" and "reputation" are sometimes used as synonymous. There is a real difference of meaning between them, and in a case of this kind it is important to preserve the distinction. According to Webster, "character" signifies the peculiar qualities impressed by nature or habit on a person which distinguish him from others; these constitute real character, and the qualities which he is supposed to possess constitute his estimated character, or "reputation." And he then defines reputation to be good name; the credit, honor or character, which is derived from a favorable public opinion or esteem and character by report. It is very true that the word "character" is often used colloquially in the same sense as reputation, and so it sometimes is by writers not aiming at accuracy of expression, but such is not its true signification. And in so important an instrument as a statute defining

a crime it must be presumed the legislature used the term in its true sense, unless the context renders another necessary. * * * We think the statute intended to use the term "character" in its accurate sense as signifying that which the person really is, in distinction to that which she may be reported to be. * * * Under this construction of the statute, obscenity of language, indecency of conduct, and undue familiarity with men have much more weight than under the other view. They seem to indicate the true character; they become exponents of it. (Citing *Carpenter v. People*, 9 Barb., 603.)

So, also, it was held in the case of *Kenyon v. People* (26 N. Y., 203; 84 Am. Dec., 177), that, under a statute which provided that any man who, under promise of marriage, seduces any unmarried female of "previous chaste character," etc., proof of character, not reputation, was required; that by character in said statute was meant actual personal virtue, and not reputation.

These cases involved the construction given by the courts to a criminal statute and under which the law presumed that the woman named in the statute, and against whom the offense was charged to have been committed, was of chaste character, and that this presumption was not outweighed or disproved by evidence of her general bad character, but required proof of specific acts of unchastity.

It may be assumed in the case under consideration that the word "character" as used in the act of March 3, 1899, is synonymous with the word "reputation" as used in the law of evidence and that good character may be established *prima facie* by proof of general reputation.

It is a general rule of evidence that character must be proved by the testimony of witnesses who have a knowledge of the general reputation of the person whose character is sought to be established; that a witness as to character should not give his mere individual opinion, but should speak as to his own knowledge of what is generally said of such person; or by negative testimony, showing that he has never heard the character of the person discussed or questioned by anyone or by those who would naturally know the character of such person.

Testing the testimony of claimant's witnesses by these rules of evidence, it is to be noted that not one of her witnesses testifies to claimant's "general" reputation or that he or she had any knowledge of her "general" reputation as to good moral character. They express merely their individual opinions.

In view of the foregoing testimony as to claimant's good moral character and the testimony offered on behalf of pensioner as to specific acts of infidelity and immorality on the part of claimant, which immorality, in 1886, is admitted by claimant, and no reformation or change of character since that time being satisfactorily established by claimant or admitted by pensioner, the Department is of the opinion that the Bureau action appealed from was fully justified, and said action is accordingly affirmed.

MARRIAGE—LOUISIANA LAWS—ACT JUNE 27, 1890.

MAGGIE DAVIS (WIDOW).

Claimant and soldier commenced to live together by common consent about the year 1882, and were married by ceremony in 1891.

Held: A marriage by ceremony is necessary in the State of Louisiana (Civil Code of Louisiana, Art. 91; *Holmes v. Holmes*, 6 La., 463; *Powers v. Executors*, 35 La. An., 630; *Blasini et al. v. The Succession*, 30 La. An., 1368). That part of the opinion in the case of *Francoise Gabriel* (12 P. D., 382) which holds a ceremony not to be essential is hereby expressly overruled.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, February 17, 1904.

Maggie, as widow of Lewis Davis, formerly a corporal in Company H, Seventh Louisiana Volunteer Colored Infantry, filed her declaration under the act of June 27, 1890, on February 4, 1899, claim being rejected January 15, 1904, on the ground that claimant was not married to the soldier until after the passage of the act invoked. An appeal was filed January 18, 1904.

The facts in this case are as follows: The claimant and soldier herein commenced to live with each other during or prior to the year 1882 in the State of Louisiana. No ceremonial marriage took place, but there is evidence of acquaintances and neighbors, undisputed, that they lived together as husband and wife, held themselves out to be such, were universally recognized as such, and were never known after said date to be other than husband and wife. They were both members of a Baptist church, and the officials thereof, some eight or nine years after they commenced living together, thought it advisable for them to be married by ceremony, thereby setting at rest any scruple that the church might have as to the necessity of a ceremonial marriage. This was acquiesced in, and claimant and her husband were married by church ceremony, and by a minister, on February 24, 1891. The claimant admits that no other marriage ever took place prior to that date, stating that the prior marital union was by "common consent."

The Civil Code of Louisiana, article 91, makes three conditions precedent to a marriage in that State: (1) Willingness to contract; (2) ability to contract; (3) a contract pursuant to the forms and solemnities prescribed by law. Articles 101 to 111 recite the forms and solemnities necessary under article 91, while articles 101 and 102 designate those officials who are authorized by law to have the right of celebration, such parties being "any priest, or minister of a religious sect, domiciled in any one of the parishes of this State," and "the judge of the parish may authorize one or more justices of the peace within his jurisdiction to celebrate marriages." All of the other articles referred to have to do with the license, mode of publication, witnesses, marriage certificate, and some other minor matters.

In the case of *Holmes v. Holmes* (6 La., 463) the court said:

Our code does not declare null a marriage not preceded by a license and not evident by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of a marriage. * * * Like all other contracts, it may be proved by any species of evidence, not prohibited by law, which does not presuppose a higher species of evidence within the power of the party.

In the case of *Mrs. Powers v. Executors of Charmbury* (35 La. An., 630) the court said:

In the absence of primary evidence to prove marriage it may be proved by secondary or circumstantial evidence. Reputation and long cohabitation will create a presumption of marriage, but such presumption can be rebutted by negative testimony.

In *Blasini et al. v. The Succession of Blasini* (30 La. An., 1368) the court said:

The presence of the civil magistrate or minister and of kindred and friends is eminently proper, and the license gives assurance of the absence of all legal obstacles. But the law does not require written evidence of the marriage, nor the testimony of those who were present and witnessed the ceremony; nor does it avoid the contract for want of a license. * * * The law accords to the man and woman and to their children a legal and social status, based upon the presumption of marriage. * * * This presumption does not sanction voluntary cohabitation nor elevate concubinage of whatever duration to the dignity of marriage. When it is said that marriage may be proved by reputation, the meaning is that the acts and conduct of the parties, as established by satisfactory proof, authorize and create the presumption that they were actually married, and this presumption is such that it yields only to proof that there was no such marriage or that it was void because of some nullity established by law.

If the code and the text of the opinions cited mean anything, they mean that a marriage, in order to be valid in the State of Louisiana, must have been celebrated by some person authorized to perform it. It is not necessary in proving such a celebration that a record be produced or witnesses introduced who were present at the time. In the absence of such proof the acts and conduct of the parties will raise a presumption that the marriage claimed was celebrated according to law; but this presumption will fall upon proof to the contrary.

No stronger proof could be had in the present case than the words of the claimant where she says that no ceremony ever was performed until February, 1891, and that the former marital union was one of common consent.

Under the law of Louisiana it is held that a ceremony performed by some person duly authorized to celebrate it is necessary to constitute a legal marriage in the State of Louisiana.

No ceremonial marriage having taken place between claimant and the soldier until after the passage of the act of June 27, 1890, she has no pensionable status. That part of the opinion in the case of *Francoise Gabriel* (12 P. D., 382) which holds a ceremony not to be essential is hereby expressly overruled.

Action affirmed.

SERVICE—ACT JUNE 27, 1890—TERMINATION OF WAR OF THE REBELLION.

MARIAH SMITH (WIDOW).

Soldier enlisted April 14, 1865, and served in the State of Texas, where the rebellion had not been suppressed, and it is presumed that his service was rendered during the war of the rebellion. His widow is therefore entitled to pension under the act of June 27, 1890.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, February 25, 1894.

Mariah, widow of Nicholas Smith, formerly a private in Company I, Forty-first United States Colored Infantry, from April 14, 1865, to November 29, 1865, filed a claim for widow's pension November 17, 1893, under the act of June 27, 1890. This claim was rejected October 11, 1902, on the ground that claimant has no title under the act of June 27, 1890, as the widow of this soldier, who enlisted in a loyal State (Maryland) after April 13, 1865, and the service rendered under such enlistment is presumed not to have been rendered in the war of the rebellion.

From this action her attorney appealed October 17, 1902.

The records of the War Department show that soldier enlisted in Maryland (a loyal State) April 14, 1865, and served until November 29, 1865, and during that period the rolls show him present except as follows:

August 31, 1865, absent sick in hospital at Brazos, Tex.; October 31, 1865, same.

It has been held by the Department that the enlistment of a soldier in a loyal State after April 13, 1865, raises the presumption that service thereunder was not rendered in the "war of the rebellion," and that the burden is upon a claimant to rebut that presumption. See case of Edward Farrell (7 P. D., 532), and case of Betty F. Nichols (13 P. D., 330).

Order No. 77, rule 1, provides that—

Services under enlistments entered into in the loyal States after April 13, 1865, * * * to be deemed service "during the late war of the rebellion," must be proven to have had in fact some direct connection with active military duty in aid of suppressing the rebellion, or have been performed in territory where the rebellion had existed and had not been declared at an end by proclamation of the President.

It is a well-known historical fact that the "war of the rebellion" still existed in the State of Texas during the period of soldier's service and for several months thereafter, and inasmuch as the records show that soldier rendered service in that State it must be presumed that such service was for the purpose of suppressing the rebellion. It is provided by order No. 77, rule 4, that service rendered in the State of Texas prior to August 20, 1866, will be presumed to have been rendered during the "war of the rebellion."

It is not intended that the present opinion shall be considered as removing the date of enlistments in loyal States for service in the war of the rebellion to a later date than April 13, 1865, but it is concluded from the facts and circumstances in the case under consideration, aided by the presumptions which arise, that soldier's service should be considered as having been rendered "during the war of the rebellion," and his widow is therefore entitled to pension under the act of June 27, 1890.

The action appealed from is reversed, and the papers returned for readjudication of the claim in accordance with this opinion.

MARRIAGE—ACT JUNE 27, 1890—WIDOW'S TITLE.

NANCY BYRD (WIDOW).

The evidence shows that claimant married soldier September 26, 1901. This was after the passage of the act of June 27, 1890, and therefore, according to the provisions of said act, she has no pensionable status under the same.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
February 25, 1904.*

Aaron Byrd, who served as private in Company C, Nineteenth United States Colored Volunteer Infantry, from May 11, 1864, to January 15, 1867, was a pensioner under the act of June 27, 1890 (Certificate No. 959820), at the rate of \$8 per month on account of rheumatism and general debility. He died October 5, 1901, and his widow, Nancy Byrd, filed a claim for pension November 11, 1901, under the same act.

Said claim was rejected August 11, 1902, on the ground that claimant was not married to soldier until after the passage of the act of June 27, 1890.

From this action of the Bureau claimant's attorney appealed September 8, 1902, contending that—

The cohabitation of soldier and claimant prior to March 22, 1867, and continuously since that time, constituted a valid common-law marriage under the laws of Maryland.

There is no dispute about the facts in this case. Claimant and soldier began living together sometime about the year 1863, and lived together continuously as man and wife, except what time he was in the army, until the date of his death. From claimant's own testimony it appears that they just "took up" together and were not married by any form of ceremony until September 26, 1901, just a few days before he died.

Claimant's testimony is corroborated by that of other witnesses. It is shown conclusively that she and soldier were married by proper ceremony September 26, 1901, and the only question to be determined

is whether a legal marriage subsisted between them prior to the passage of the act of June 27, 1890.

Section 2 of the act of Congress approved August 7, 1882, amending section 4702 of the Revised Statutes, contains the following provision:

That marriages, except such as are mentioned in section 4705 of the Revised Statutes shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of the marriage or at the time when the right to pension accrued.

In the case of *Eliza J. Ellis* (12 P. D., 159) it was held that section 4705 of the Revised Statutes does not apply to claims under the act of June 27, 1890. It is, therefore, necessary to determine this question of the legality of claimant's alleged common law marriage in accordance with the laws of the State of Maryland, where she and soldier lived.

In the case of *Dennison v. Dennison* (35 Md., 361) the court said:

We think we are safe in saying that there has never been a time in the history of this State, whether before its independence of Great Britain or since, when some ceremony or celebration was not deemed necessary to a valid marriage. In the early days of the province it was not absolutely necessary that a minister of religion should officiate. A judge or magistrate could perform the ceremony, but still in all cases some formal ceremony was required.

A marriage contract in this State merely *per verba de praesentis* or *per verba de futuro cum copula* has no sanction in our law, whatsoever may be the law upon this subject elsewhere.

From this it will be seen that a mere "taking up together" or an agreement to live together as man and wife, and so living howsoever long continued, does not constitute a valid marriage under the laws of the State of Maryland. Common-law marriages have never been recognized. A proper ceremony is necessary to make a marriage valid.

In 1867 the legislature passed the following act regarding marriages between colored persons:

All marriages made and celebrated in this State prior to March 22, 1867, by and between colored people are hereby confirmed and made valid, to every intent and purpose, from the time of the celebration of such marriages, respectively; and every such marriage shall be held and taken by all the courts of this State to be good and sufficient in law, to all intents and purposes, provided that in every case the parties claiming to have been married by a competent person shall, by sufficient proof before some justice of the peace, establish the fact of having been so married, a certificate of which shall be filed with the clerk of the circuit court of the county in which said marriage was celebrated or the court of common pleas of Baltimore city, and be preserved with the register of marriage licenses in the office of said clerk.

In the case of *Samuel Tuttle* (11 P. D., 278) it was held that the failure to comply with that portion of said act requiring certain proof and the record of a certificate thereof did not operate to defeat the purpose of the act, yet there is nothing in its provisions which makes a common-law marriage valid. While this act uses the words "colored persons," it was no doubt passed to validate the marriages of slaves contracted while in bondage. But according to its provisions no

marriage could be made valid unless the parties had been married by a "competent person." Even if it was intended that the act should include the marriages of all colored persons, free and slave, it presupposes a ceremonial marriage, and was not intended to validate any marriage that was lacking in this essential.

In regard to the character of the evidence necessary to form a marriage, in the case of *Redgrave v. Redgrave* (38 Md., 97) the court said:

Where parties live together ostensibly as man and wife, demeaning themselves toward each other as such and are received into society and treated by their friends and relatives as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married.

In the case under consideration, as stated above, claimant and the soldier lived together as man and wife for about forty years. They so recognized each other and were so considered by their neighbors. In the absence of any evidence to the contrary, it could be presumed that they had been married by a proper ceremony prior to their marriage September 26, 1901, but this marriage of itself destroys the presumption of a prior marriage. Under the laws of the State of Maryland claimant and soldier are not shown to have been married prior to the passage of the act of June 27, 1890, and therefore she has no pensionable status under said act.

The action of the Bureau is hereby affirmed.

MARRIAGE—MAINE—IMPEDIMENT—EVIDENCE.

ABBIE M. MANSON (ALLEGED WIDOW.)

The evidence shows that claimant's marriage to the deceased sailor was invalid, as he then had a living wife, and that claimant knew, or was in possession of facts that would cause a reasonably prudent person to ascertain, that such marriage would be void. The consequent cohabitation was, therefore, meretricious as well as adulterous.

Held: That in Maine cohabitation under the form of marriage, meretricious at its outset, still remains so after the removal of an existing impediment, unless a new contract is entered into. Continued cohabitation will not afford a legal presumption of a subsequent marriage.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, February 29, 1904.

February 19, 1897, Abbie M. Manson of the County of York and the State of Maine, applied, under the provisions of the act of June 27, 1890, for a pension as the widow of William H. Manson, late of the United States Navy; claim No. 16755.

This application was rejected by the Bureau, February 7, 1900, on the ground that she was "not the legal widow of soldier." From this action she appealed July 1, 1902.

It appears from the records of the town of Kittery, County of York and State of Maine, that the deceased soldier was married to one Julia M. Tucker, on March 30, 1857; and the evidence shows that they lived together as man and wife for a period of about ten years, and lived in the same county and the immediate vicinity of each other after their separation and until the death of Julia M. Manson in 1877. The clerk of the supreme judicial court within and for York County certified, under the seal of said court, that he had examined the records thereof from 1857 to 1877, and did not find any record of the divorce of the parties to this marriage. Parole evidence was also adduced on special examination to the same effect.

February 10, 1870, the deceased sailor and this claimant were ceremonially married at Portsmouth, N. H.; and the evidence shows that they cohabited together as man and wife in the State of Maine until the death of the sailor on January 28, 1897. As to the circumstances of her marriage, and her knowledge of any impediment thereto, the claimant testifies as follows:

My husband, William H. Manson, had also been married once and once only before his marriage to me. He married Julia Tucker, but the date I can't give, and she died in South Berwick, Me. I know that she is dead because her mother or some of her folks sent a letter to my husband to come to the funeral. I saw the letter. I was with him when he got the letter from the mail. We were living in the same house that I now live in—together as man and wife—so it must have been since Manson and I were married. It isn't many years ago. * * * My husband never applied for or received any divorce from his wife to my knowledge. Julia Tucker, however, married a man named Abbott who lived in South Berwick, Me., after she left my husband but before he married me. I know that my husband and she separated, but I don't know which one left the other. My husband told me that the reason he left her was because she went with other men while he was in the Navy, but he never said anything to me that he had ever tried to get a divorce from her. When my husband proposed marriage to me he told me that they had been separated two or three years, I forgot which, and that that freed him from her, and I believed it and married him. I wouldn't have married him if I had not believed it. * * * There was no ceremony of marriage between Manson and myself after his first wife, Julia M. Manson, nee Tucker, died.

There is no other evidence of Julia M. Manson's marriage to one Abbott, as testified to by this claimant, though it appears that she lived with him as his housekeeper or otherwise, and was sometimes called by "his name." It does not definitely appear when Julia went to live with Abbott, though the testimony of Elizabeth C. Pray, her sister, indicates that it was subsequent to claimant's marriage with the sailor.

This latter marriage was unquestionably void—without any force or effect, and the consequent cohabitation was adulterous. If this claimant is now the widow of the deceased sailor, her title must be based upon some contract of marriage entered into after 1877, the date of the death of Julia. No new marriage has been shown. In fact claim-

ant testifies that there was none. Hence it must be assumed that there was no new contract.

Marriage in Maine is a civil contract (*State v. Wetherby*, 43 Me., 258), and something more. It is a relation or status defined and regulated by law, and of which the duties, rights, and obligations are fixed by the law of domicile (*Adams v. Palmer*, 51 Me., 480). In civil suits (other than actions for seduction), cohabitation, reputation, and declarations of the parties—written or oral—and their conduct, and all other circumstances usually attending the marriage relation and indicative of its existence are admissible in evidence as proof of marriage (*Camden v. Belgrade*, 78 Me., 204). This proof is admissible, however, merely on the ground that a legal marriage may be inferred from such facts, and not that cohabitation, reputation, or declarations of the parties fix the “relation” or “status” of marriage. (*Carter v. Carter*, 28 Me., 509.)

In the case under consideration no inference or presumption will prevail, as the facts are all established by competent and satisfactory evidence. It clearly shows that an impediment existed to a legal marriage between claimant and sailor, and that she knew or was in possession of facts that would cause a reasonably prudent person to ascertain that the marriage would be invalid and that the cohabitation which followed was meretricious and adulterous.

In the case of *Cram v. Burnham* (5 Me., 213) the supreme court of Maine held:

Cohabitation known to be adulterous in its origin, the former wife still being alive, conveys no right to the guilty parties against third parties; nor does the continuance of such cohabitation after the death of the lawful wife afford legal presumption of a subsequent marriage.

The facts in that case were much the same as the one here being considered. The former and legal wife was living at the date of the second marriage, and the facts were known to both the parties thereto. In discussing the facts in that case the court said:

Until the death of the lawful wife their cohabitation was lewd and lascivious.
* * * After her death their cohabitation, although not attended with a breach of marriage, was still an offense against decency and good morals.

In other words, the cohabitation being meretricious at the outset, it was not cured by the removal of the impediment, and no new contract would be presumed or inferred from the continued and unchanged cohabitation of the parties.

As stated, the marriage of claimant and the deceased sailor in 1870 was invalid, and their subsequent cohabitation was meretricious as well as adulterous. No new contract following the removal of the impediment can be inferred in view of the testimony of claimant. The subsequent cohabitation was, therefore, equally meretricious. Claimant is not shown to be the legal widow of William H. Manson. The rejection is affirmed.

SERVICE—HONORABLE DISCHARGE—PARDON—DESERTION—ACT JUNE 27, 1890—JOINT RESOLUTION OF JULY 1, 1902.

ISAAC MARVIN.

1. The President having pardoned claimant for the offense of which he was convicted by a court-martial on condition that he reenlist in the same command and faithfully serve out such term of enlistment, and claimant having fully complied with such condition, the sentence of the court-martial was wiped out, including that part relating to a dishonorable discharge; and having been discharged by the order carrying out the President's pardon previous to his reenlistment, he was not dishonorably discharged by sentence of the court-martial, but honorably discharged by Order 141, War Department.
2. Nothing appearing in the record suggesting that claimant's second service was not faithfully performed, it will be presumed that it was, and he accordingly comes within the provisions of the joint resolution of July 1, 1902, and the action of the Bureau rejecting his claim on the ground that his service under his last enlistment was not faithful is reversed.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, February 29, 1904.

Isaac Marvin, late of Company L, Seventh Pennsylvania Cavalry, filed a claim for pension, October 2, 1902, under the act of June 27, 1890, which was rejected March 28, 1903—

On the ground that claimant, having been dishonorably discharged from his first contract of enlistment, and his entire last enlistment not being faithful, he has no title under the joint resolution of July 1, 1902, amending act of June 27, 1890.

From this action he appealed September 5, 1902.

On July 25, 1899, the War Department reported as to this man's service as follows:

WAR DEPARTMENT,
RECORD AND PENSION OFFICE,
July 25, 1899.

Respectfully returned to the Commissioner of Pensions.

Isaac Marvin, Capt. McCormick's Co., Co. L, Regt. 7 Pa. Cavy., was enrolled Nov. 27, 1861, and is reported on roll Oct. 31, 1863. "Deserted at Smiths Cross Roads, Tenn., 29th August, 1863."

From enrollment to desertion he held the rank of private, and during that period the rolls show him present except as follows:

Oct. 31, 1862, absent, prisoner; April 16, 1863 (S. M.), present, temporarily on D. S., with brigade commissary; April 30, 1863, absent on D. S., by order of Gen. Rosecrans; August 31, 1863, absent, in confinement at Hd. Qrs. 1st Brig., 2d Cavy. Div. He was tried by G. C. M. assembled at Hd. Qrs. 1st Brig., 2d Cavy. Div., at Smiths Cross Roads, Tenn., August 29, 1863, charged with conduct prejudicial to good order and military discipline (commission of highway robbery); plead guilty. Found guilty and sentenced to forfeit all pay and allowances now due or may become due him; to have half his head shaved, and to be drummed out of the service and confined at hard labor for 3 years at such military prison as the commanding general may direct.

The findings and sentence approved, and except that part of the sentence, viz, to have one-half his head shaved and to be drummed out of the service, which is

hereby remitted. The Brig. Pro. Mar. will send prisoner to the Pro. Mar. Genl. of Dept. with a copy of this order. (Genl. Order, No. 19, Hd. Qrs. 1st Brig. 2d Cavy. Div. Aug. 30, 1863), by order Col. R. H. G. Nienty.

Other records show as follows: Nov. 14, 1863. Deserted Aug. 28, 1863, Smiths Cross Roads, Tenn. Aug. 31, 1864. Joined from desertion Aug. 29, 1863, Smiths Cross Roads, Tenn. Returned to duty per S. O. 141 W. D. which G. O. dated April 17, 1864, shows: By direction of President soldier is fully pardoned for the offense of which convicted by G. C. M. Aug. 13, upon condition of his reenlisting for 3 years, and faithfully serving out said enlistment.

Age, 18 years; height, 5 feet 11 inches; complexion, light; eyes, grey; hair, brown; born, Covington, Pa.; occupation, farmer.

Pris. of war records show him captured at Murfreesboro, Tenn., July 13, 1862; paroled at Warren City, July 15, 1862; rept'd at Camp Parole, Md.; date not given and sent to Cin. O., to report to Genl. Wright, Sept. 22, 1862; again capt'd at Smiths Cross Roads Aug. 28, 1863; conf'd at Rich., Va., Sept. 26, 1863; paroled at City Point, Va., March 7, 1864; rept'd at Camp Parole, Md., March 11, 1864, and is rept'd sent to Camp Chase, O., March 26, 1864: also fur'ghd March 25, 1864, for 15 days and is rept'd deserted April 8, 1864; furl. expired April 8, 1864. No further information.

Isaac Marvin, Co. L, 7th Pa. Cavy; enrolled April 15, 1864, and is reported on M. O. roll of Co., dated Aug. 23, 1865; absent sick since Aug. 17, 1865. No discharge furnished at M. O. of Orgn. He was furnished a discharge by C. M. O. of State Sept. 5, 1865, to date Aug. 23, 1865, date of M. O. of Orgn.

From enlistment to discharge he held rank of private, and during that period the rolls show him present, except as follows:

Aug. 31, 1864. (1" in which fl.) Absent. Pardoned by Sec. of War. At Columbia, Tenn. Dismounted. Gained from desertion Oct. 31, 1864, absent on D. S. at Columbia, Tenn., Aug. 30, 1864.

Age 19 years. Height 5 feet 11 inches. Complexion light, eyes blue, hair dark, born Tioga, Pa. Occupation farmer. E. P. shows 2d enlistment, last served in Co. L, 7th Pa. Discharged S. O. 141 W. D. April 7, 1864.

The medical records show him treated as follows:

As Isaac Mervin, priv., Co. L, 7th Pa. Cav., Aug. 20 to 23, 1865, convalescent. Aug. 24 to 26, 1865, chronic diarrhea; Aug. 26 to 29, 1865, *consumption*; as Isaac Morvin, etc. Sept. 1 to 5, 1865, dysentery, retd. to duty.

Nothing additional found.

In response to a call from you on May 14, 1902, as to whether claimant was ever honorably discharged from both services and the date thereof, the War Department, under date of May 29, 1902, replied as follows:

Respectfully returned to the Commissioner of Pensions, with the information that it has been determined by this Department that Isaac Marvin, Company L, Seventh Pennsylvania Cavalry Volunteers, was dishonorably discharged from his first service in this organization August 30, 1863, by operation of the sentence of a general court-martial; and that he was discharged from his second service in this organization August 23, 1865, by reason of the muster out of his company on that date, he being at the time absent sick.

January 20, 1904, this Department called the attention of the honorable Secretary of War to the foregoing report as follows:

This record appears to be contradictory, unless there were two persons in said company named Isaac Marvin.

He is reported deserted August 29, 1863, and also tried by a court-martial convened on that day, sentence promulgated August 30, 1863 (order No. 19). Again "joined from desertion August 29, 1863, Smiths Cross Roads, Tenn."

It also appears that he was again enlisted April 15, 1864, then August 31, 1864, absent; that he was "gained from desertion October 31, 1864," also absent on D. S. at Columbia, Tenn., August 31, 1864. The record furnished gives his birthplace as Tioga, Pa., and in previous report place of birth is given as Covington, Pa. In one report his eyes were reported to be blue and hair dark, in another eyes gray and hair brown. He is also reported discharged by S. O. 141 W. D., April 7, 1864.

This Department desires to be informed whether there were two persons by the name of Isaac Marvin in Company L, 7th Pennsylvania Cavalry. If not, was claimant discharged by order of the President or Secretary of War April 7, 1864? Did he reenlist in compliance with the terms of his pardon, and was he on duty or reported present from this second enlistment to discharge? Is his whereabouts from April 15, 1864, to August 31, 1864, accounted for?

In response to the foregoing the following report was received:

Respectfully returned to the honorable the Secretary of War.

Only one man named Isaac Marvin served in Company L, Seventh Pennsylvania Cavalry Volunteers. That man was mustered into service December 5, 1861, and was dishonorably discharged from service August 30, 1863, by operation of the sentence of a general court-martial approved by the proper reviewing authority and promulgated on the date last named. The date, August 28, 1863, on which certain records show him to have been captured by the enemy, is evidently incorrect, because it is shown that he was present before the general-court martial on August 29, 1863, and he must, therefore, have been captured on or after August 29, 1863. During the period of his captivity in the hands of the enemy, and during his subsequent presence at United States military posts, stations, or camps until March 25 or 26, 1864 (when furloughed on the assumption that he was then a member of the organization named), he was not in the military service of the United States.

He was again enrolled April 15, 1864, at Harrisburg, Pa., and was mustered into service on the same day as a private of the same organization, under the provisions of the conditional pardon granted by the President April 7, 1864. Nothing has been of record to show his whereabouts between the date of his reenlistment and August 20, 1864, on which date the company records show him on detached service at Columbia, Tenn. No charges of desertion or of absence without leave have been found of record against him during his second service.

F. L. AINSWORTH,
Chief, Record and Pension Office.

[Second indorsement.]

WAR DEPARTMENT,
January 29, 1904.

Respectfully returned to the honorable the Secretary of the Interior, inviting attention to the foregoing report of the Chief of the Record and Pension Office of this Department.

ROBERT SHAW OLIVER,
Assistant Secretary of War.

Two questions arise in the determination of this claim, either of which is decisive of the case.

1. What was the effect of the President's pardon?
2. Was his entire service under his last enlistment faithful?

The effect of a full pardon is to remove the punishment and all legal

disabilities consequent on the criminal, giving the offender a new credit, capacity, and character, so that in the eye of the law he is as innocent as if he had never committed the crime. (17 Am. & Eng. Cy. of L., 325, and citations therein.)

When any condition is annexed to the pardon, the condition must be performed or the original sentence remains in full force and may be carried into effect. (Ibid., 328.)

It appears from the foregoing record that claimant reenlisted in the same company in which he was serving when court-martialed on April 15, 1864, and two days later order 141 was issued fully pardoning the soldier for the offense of which convicted upon condition of his reenlistment for three years and faithfully serving out his enlistment, and that he joined his command August 31, 1864, and was returned to duty per said order 141, and served faithfully, for all the records show, until honorably discharged September 5, 1865, to date August 23, 1865.

This was in full compliance with the conditions of the pardon. It would also appear that by said order he was discharged from said first enlistment April 7, 1864, before reenlisting.

Thus it would appear that by his full pardon the sentence of the court-martial was wiped out, and instead of being dishonorably discharged by said sentence he was honorably discharged by order of the President to date April 7, 1864, to enable him to reenlist in compliance with conditions imposed by the pardon.

But independent of this he comes within the provisions of the joint resolution of July 1, 1902. There is nothing in the record suggesting that his service under his last enlistment was not faithful, and in the absence of anything to the contrary it will be presumed that such service was faithful.

The action of the Bureau is, therefore, reversed, and the papers in the case returned herewith.

MARRIAGE-CONNECTICUT LAWS-EVIDENCE-IMPEDIMENT.

ELIZA BOAZMAN (WIDOW).

There is record evidence of claimant's marriage to the soldier on December 17, 1868, in the State of Connecticut, and it is shown that the parties lived and cohabited together as husband and wife thereafter until soldier's death six years later. Claimant admits a prior marriage many years ago, but swears that said first husband went away and never returned, and she was informed about the close of the war that he was dead, a newspaper notice of his death having been read to her.

Under the laws of Connecticut, a marriage being proved by competent evidence, the law raises a presumption in favor of its legality, and such previous marriage did not cast the burden upon the claimant of proving either that the former husband was dead or, if living, that a legal divorce had been granted.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
February 29, 1904.*

This appellant, Eliza Boazman, on August 11, 1890, filed this claim, No. 450643, for pension under the act of June 27, 1890, as widow of Richard Boazman, who was a member of Company C, Fifteenth Connecticut Infantry, from August 15, 1862, to June 27, 1865, and who died September 29, 1874.

Said claim was rejected April 4, 1896, on the ground of claimant's inability to establish the fact and date of her former husband's death and, consequently, the validity of her marriage to the soldier; and on October 7, 1902, she appealed, contending the death of her first husband should be presumed, he having been absent and unheard of for over forty years.

There is record evidence of claimant's marriage to the soldier on December 17, 1868, in New Haven, Conn., with testimony that they lived and cohabited together thereafter until his death six years later. They had no children.

She admits a prior marriage in England to one Butterfield, with whom she came to this country many years ago, she says, and with whom she continued here to live for a number of years, when he either deserted her or went off to look for work and never returned, and she was told, about the close of the war, that he had died, a newspaper notice of his death being read to her by the party who told her of it, but who this party was she does not remember.

The testimony in the case is meager, somewhat conflicting, and not convincing. It appears, however, that she was known as a widow prior to and at the time of her marriage to the soldier; and while she is a very poor, illiterate, and ignorant woman, for years past an inmate of the county almshouse, and there is some evidence that she has been addicted to liquor, the testimony shows she is of good character for veracity, and no reason appears aside from immaterial discrepancies, for discrediting her testimony upon the material facts.

Under the act of August 7, 1882, the validity of claimant's marriage to the soldier must be determined herein under and by the laws of the State of Connecticut.

The supreme court of that State held, in the case of *Erwin v. English* (61 Conn., 602), citing *King v. Inhabitants of Twining* (2 B. and Ald., 386), and 1 Bishop on Marriage and Divorce, sec. 457, that a duly proved marriage is presumed in law to be valid until its invalidity is proven, and that the burden of proving its invalidity is upon the one asserting such invalidity.

The court state:

As against the duly proved marriage of Patrick Larkin and Cephalia P. Bartlett, November 20, 1860, it was not enough for the defendant to prove that Patrick was married seventeen years before to Mary O'Niell. Proof of such previous marriage

did not cast the burden upon the plaintiff of proving either that the former wife was dead, or if living that a legal divorce had been granted.

One of the plaintiff's claims in reply to the defendant's claim of title by prescription, was that on the 20th of November, 1860, she was and ever since had been a married woman, the wife of said Patrick, who died December 31, 1882. She proved the marriage by competent evidence. Being proved, the law raises a presumption in favor of its legality, upon which she had the right to rely until its illegality was proved.

As held in the case of Mary J. Gilliland (13 P. D., 90), there is, in a pension claim, no shifting upon the Government of the burden of proof, in such claim, of the legal termination of a former marriage, the Government not being a contestant of the title claimed; but there exists, nevertheless, upon a claimant the burden of satisfactorily establishing such title, in establishing which such claimant may properly be required by the Bureau of Pensions to furnish whatever proof is reasonably necessary to convince the mind of the adjudicating officer that said title exists.

No good reason appears in this case for questioning the validity of the claimant's marriage to the soldier. There is no intimation or suspicion that her former husband was, in fact, alive at the time of such marriage, and no such suspicious circumstances or facts appearing as to warrant further investigation as to her former husband. She has proved, *prima facie*, under the laws of the State of Connecticut, a valid marriage to the soldier, and there is nothing whatever shown tending to impeach its apparent validity. It is therefore held to have been valid and that she is his widow.

Rejection of claim is reversed accordingly.

**SERVICE—WAR WITH MEXICO—TEAMSTER—ACT OF JANUARY 29,
1887—EVIDENCE.**

ALLEN J. PATRICK.

There is no evidence, aside from the claimant's statements, that he rendered any service as an enlisted man in the Army of the United States during the war with Mexico. His service was as a teamster in the Quartermaster's Department, which is not a pensionable service under the act of January 29, 1887.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
February 29, 1902.*

Allen J. Patrick has filed various applications for pension under the act of January 29, 1887, all of which have been rejected by the Pension Bureau on the ground that the records do not show that he rendered any service as an enlisted man in the Army of the United States during the war with Mexico. From that action he, through his attorneys, appealed on February 16, 1904.

In a declaration filed January 29, 1903, the claimant set forth the basis of his claim in what he designates a "first," "second," and "third" "group of facts," as follows:

FIRST GROUP OF FACTS.

I am the identical Allen Jones Patrick who served under the name of Allen J. Patrick in the company commanded by Colonel Doniphan in the war with Mexico; that on or about May 10, 1845, I went with Col. John C. Fremont on an exploring expedition from Fort Leavenworth, Kans., to Sutters Fort, now Sacramento city, Cal., as topographical assistant surveyor; that there my time expired, and I returned to Fort Leavenworth in May, 1846, when I enlisted in the First Regiment of Missouri Cavalry, Colonel Doniphan, Capt. John W. Reed, as Company B teamster; that in this latter service we proceeded to New Mexico under command of Gen. S. W. Kearny; that in this regiment I served for more than sixty days, to wit, from the time of my enlistment in May, 1846, until, to wit, on or about the 18th day of August, A. D. 1846, when, having arrived at Santa Fe, N. Mex., I was badly hurt by a mule and was sent to the hospital, where I remained for about thirty days, during which time my regiment left for Chihuahua, old Mexico. After my recovery it was found that the country was full of guerrillas, and I could not join my regiment, but was now put on detached service and was never afterwards able to rejoin my regiment, and, of course, never received a discharge from such service, although I received a discharge from the post commander.

That I am 74 years of age, having been born in Baltimore, Md., on the 16th day of September, 1829.

SECOND GROUP OF FACTS.

That while I was at Santa Fe, N. Mex., as above mentioned on, to wit, the 14th day of January, 1847, Governor Bent, the military governor of New Mexico, was assassinated at Taos, N. Mex., whereupon Col. Sterling Price, by proclamation, called for volunteers to suppress the Indians, or Mexican rebels, or guerrillas, and I volunteered in that service and served for about five months, when I received a certificate of discharge from Colonel Price. While so serving I took part in the Battle of Taos, in which battle I was badly wounded in the head, on, to wit, February 4, 1847, by a lance in the hands of the enemy while I was scaling the walls in a charge by our forces. Because of this wound I now wear a silver plate in my head.

THIRD GROUP OF FACTS.

I was personally named in a resolution of Congress for service in said war, in which, on, to wit, the — day of May, A. D. 1857, I was granted a land warrant.

Out of these three "groups" the only fact established by evidence other than the claimant's statement is that he was granted a bounty land warrant in 1857. In his application for bounty land he stated that he was a teamster in Captain Reed's company of the regiment commanded by Colonel Doniphan; and that he—

volunteered at Fort Leavenworth, in the month of May, in the year 1846, for the purpose of driving a Government team to Mexico, and proceeded under said command to old Santa Fe, where he was honorably discharged and paid in full by Captain McKissack, his regimental quartermaster, about the 1st day of November, in the year 1846.

He further alleged that—

he arrived at old Santa Fe, aforesaid, about the 24th day of August, 1846, and from that time until his discharge aforesaid he was employed in constructing a fort at said place.

An indorsement upon said declaration made in the Quartermaster-General's office, shows that he was employed by Captain McKissack, assistant quartermaster at Fort Leavenworth and en route to Santa Fe, from June 7, 1846, to July 31, 1846, and by the same officer at Santa Fe from August 1, 1846, to April 30, 1847, drawing supplies from Bents Fort.

This clearly shows that his status was that of a civilian employee in the Quartermaster's Department. He did not then claim to have been in the service in any other capacity during the war with Mexico or at any other time.

In his various claims under the act of January 29, 1887, he has alleged that he was an enlisted man detailed as a teamster in Colonel Doniphan's regiment. If this were true he would have no title to pension under said act on account of that service, as he was never regularly discharged, and an "honorable discharge" is a necessary prerequisite to the allowance of pension under the act of January 29, 1887. However, the evidence is conclusive that he was a civilian teamster, and this is conceded in the appeal.

Said appeal is based upon the "second group" of alleged facts, the contention being that the claimant volunteered to serve under Col. Sterling Price, and did so serve for about five months, and that during such service he took part in the battle of Taos, where he was wounded in the head. The claim is based upon the clause of the act of January 29, 1887, granting pensions to those who, "being duly enlisted" etc. * * * were actually engaged in battle in said war" (with Mexico).

The records of Colonel Price's command afford no evidence of claimant's alleged service therein. There is, in fact, no evidence whatever of such service aside from his own statement. The battle of Taos was fought on the 4th of February, 1847, and it appears from the indorsement on claimant's application for bounty land heretofore referred to that he was then employed as a teamster at Santa Fe.

It is argued in the appeal that since, under the provisions of the act of January 29, 1887, the fact that any person has been granted a land warrant, under any act of Congress, on account of service in the war with Mexico, is made "prima facie evidence of his service and honorable discharge," this claimant's title to pension under said act is prima facie established, and can be overthrown only by evidence showing that the land warrant was improperly granted.

The bounty-land warrant is prima facie evidence of the service only on account of which such warrant was granted. The law (act of March 3, 1855) under which bounty land was allowed in this case authorized its allowance to "teamsters who may have been employed, under the direction of competent authority, in time of war, in the transportation of military stores and supplies." The employment and service of the

claimant as a teamster during the war with Mexico is admitted. But teamsters who were not enlisted men are not pensionable under the provisions of the act of January 29, 1887.

The attorneys who present this appeal can hardly have intended to argue that the grant of a bounty-land warrant for service as a teamster in Colonel Doniphan's regiment is *prima facie* evidence of subsequent service as an enlisted man in Colonel Price's regiment. That would be too absurd for serious consideration.

For reasons above stated the denial of pension to this claimant under the act of January 29, 1887, is held to have been correct, and is affirmed.

DEPENDENCE—ACT OF JUNE 27, 1890, AS AMENDED BY ACT OF MAY 9, 1900.

JOSEFA TAYLOR (WIDOW).

The evidence establishes that the claimant is not dependent, within the meaning of the amendatory act of May 9, 1900, she having a net income of of \$325 per annum.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, February 29, 1904.

On May 28, 1900, Josefa Taylor, as widow of Charles E. Taylor, formerly an acting assistant paymaster, U. S. Navy, filed a claim for pension under the act of June 27, 1890, as amended by the act of May 9, 1900, which said claim was rejected August 19, 1902, on the ground that the evidence failed to show that she had been dependent, within the meaning of said act as amended, since date of filing said claim. A prior claim under the act of June 27, 1890, had been rejected, on similar ground, in July, 1896.

From the adverse action of August 19, 1902, claimant's attorney appealed September 12, 1902, contending as follows:

I have the honor to appeal said claim, and contend that by the evidence she is clearly entitled to said pension. I presume that said rejection is based on the fact that, in addition to the sum of \$125, her yearly income, the same being her dower interest in the estate of her late husband, her children further allow her the income due to them from said estate. This last is a gift, in which they are in no wise bound or holden to allow her, and which they are at liberty to withhold from her at any time. If her said claim was rejected on this ground, I contend it is untenable, as charitable gifts to a widow in such case is no bar under the terms of said act. Her permanent income from all sources does not exceed the sum of \$250, and she is therefore dependent within the meaning of said act.

The facts, as clearly shown by the evidence, including that obtained on special examination, are as follows:

The claimant owns and, together with her son-in-law, who pays no cash rental, occupies a dwelling house on corner of Fifth and Cedar

streets, in the city of Bangor, Me., assessed at \$3,400, and shown by competent testimony to be worth \$4,000. This property is free from incumbrance and would rent for about \$300 per annum.

Claimant testified before a special examiner on July 17, 1902, that the taxes had amounted to about \$67 per annum, and the official assessor of real estate in Bangor testified, on July 19, 1902, that at a valuation of \$3,400 for the years 1900 and 1901, the taxes were \$71.40 per annum. The claimant and her son-in-law's family are the only occupants of the house.

The claimant owns no other real property. Her gross annual income from all sources is shown by her own testimony, corroborated by that of other competent witnesses, to be what would have been her husband's distributive share of the rents and profits of valuable real estate left by his father, amounting to about \$500 per annum.

It appears in evidence that under the laws of Maine she would have been entitled to but one-third of her husband's share of that fund, but, under an amicable arrangement between the parties some years ago, her three children assigned their interests to her, and it is, of course, the claimant's dower interest in said fund that is referred to by appellant as her "yearly income" of \$125.

In view of the facts and circumstances of the case at bar, it is unnecessary to pass upon the question of the probable permanence of the assignment of interest made by the children to their mother, for if said assignment be revoked, as suggested by appellant, she would still not be entitled to a pension until such time as it might be shown that her dower interest in said fund, supplemented by a fair net rental of her real property, would amount to less than \$250 annually.

The evidence shows that the property is not incumbered, and that the gross annual rental would be about \$300. Deducting, say, \$100 for taxes, insurance, and repairs, there would yet remain a net revenue, from that source, of \$200. Adding her own individual income from her late father-in-law's estate, estimated at, say, \$125, would make a total net income of \$325.

In the case of Rachel Warner (12 P. D., 266) the income mentioned in the amendatory act of May 9, 1900, was construed to be that which the widow has, at date of filing claim, as a continuing revenue, from year to year, arising from her property or business, or from any sources other than her own labor, but said construction does not contemplate that she may own and exclusively occupy a valuable property, the net income from which, if rented, would, together with moneys regularly derived from sources other than her own labor, amount to more than \$250 per annum, and still have a pensionable status. The absurdity of such a construction is too palpable to need further comment than a suggestion that Congress could not possibly have had such a degree of liberality in view when said amendment to the law of June

27, 1890, was enacted, for otherwise it would logically follow that this claimant might own and occupy a city dwelling worth \$40,000, readily rentable at \$3,000 per annum instead of \$300, without forfeiting a pensionable status. The mere statement of such a proposition carries its own refutation.

The action appealed from is hereby affirmed.

ADULTEROUS COHABITATION—ACT OF AUGUST 7, 1882—MARRIAGE.

JULIA EDINGTON (AS WIDOW).

The act of March 3, 1901, is dependent in many respects upon prior legislation, but it in no respect repeals or modifies the act of August 7, 1882.

The adulterous cohabitation of a widow subsequent to the passage of the act of August 7, 1882, works a forfeiture of her right to a pension under the act of March 3, 1901.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, March 8, 1904.

Julia Edington, as widow of John Edington, who served as a private in Company K, One hundred and twenty-fifth United States Colored Volunteer Infantry, filed a declaration for pension under the act of March 3, 1901, which was rejected on August 23, 1902, on the ground that she had forfeited her title to renewal of pension under the act of March 3, 1901, by her conduct since the death of the soldier, and since the passage of the act of August 7, 1882.

From this action the claimant filed an appeal on October 28, 1902.

The evidence and records show that the soldier died while in the service. The widow claimant was subsequently pensioned. On November 22, 1874, her pension was discontinued by reason of her marriage to one John Mitchell. The records on file herein show that on April 23, 1880, she was granted a decree of divorce by the Taylor County circuit court of the State of Kentucky, from her second husband.

It is shown by the evidence adduced on special examination of this claim, and even admitted by the claimant, that since the death of the soldier she had given birth to two illegitimate children. The first child was born after the death of the soldier and prior to her marriage to Mitchell, when the claimant resided at Campbellsville, Ky. One Wilson Page was its father. Her second illegitimate offspring was born during her residence in Louisville, Ky., and one Will Reed was its father.

The claimant contends that the provisions of the act of March 3, 1901, contain no bar to her right to pension, and that though she had cohabited with one or a dozen men after she was divorced from her

second husband the act of August 7, 1882, would have no manner of bearing upon the merits of her claim for restoration under the act of March 3, 1901.

It is conceded for the purpose of this decision that the relation of adulterous cohabitation did not exist at the date of filing her application for restoration under the act of March 3, 1901, or for many years prior thereto.

The act of March 3, 1901, is dependent in many respects upon other or prior legislation, but it in no respect repeals, amends, or modifies the act of August 7, 1882. If this claimant had not remarried and had been guilty of open, notorious, and adulterous cohabitation after the passage of the act of August 7, 1882, her conduct would certainly have been sufficient cause for dropping her name from the pension rolls. It is a fair and reasonable presumption, therefore, that Congress intended that the provisions of the act of August 7, 1882, should continue in force, and be applicable to claims for restoration filed under the act of March 3, 1901.

It has been held by this Department in a long line of cases that the act of August 7, 1882, operates as a bar to pension if the adulterous cohabitation existed after the passage of said act, and even prior to the date of filing the declaration and whether the claimant be a pensioner or an applicant for pension. It has also been uniformly held that the provisions of said act applied to claims filed under the act of June 27, 1890.

The law makes no provision for restoring the pensionable right when the relation of adulterous cohabitation ceases, and the inhibition contained in the act of August 7, 1882, applies with equal force to applicants and pensioners, whether under the act of March 3, 1901, or under prior laws.

The only question involved in this appeal is whether the widow claimant continued her unlawful relations after August 7, 1882. On this point the claimant testified before a special examiner in August, 1902, that an illegitimate son was born after she moved to Louisville, Ky., and that he was then 19 years of age, showing that he was born in 1883, or after the passage of the act of August 7, 1882.

She further testified that one R. E. Puyear brought her from Campbellsville to Louisville, and employed her as cook in his boarding house on West Jefferson street; that Puyear only remained in Louisville for six or seven months and then moved back to Taylor County, Ky. It appears from the evidence that the claimant resided on Tenth street, Louisville, Ky., when her child was born.

The city directories of Louisville, Ky., show as follows:

- 1883. Judy Edington, domestic, 943 West Jefferson street (Puyear's address).
- 1884. Judy Mitchell, 316 Tenth street.
- 1885. Julia Edington, 316 Tenth street.

It appears clear from the evidence that this claimant was guilty of open and notorious adulterous cohabitation subsequent to the passage of the act of August 7, 1882, and she is, therefore, not pensionable under the act of March 3, 1901. The action appealed from is affirmed.

PRACTICE—APPEAL—INTERLOCUTORY ORDER.

GEORGE P. ROBERTSON.

An appeal will not lie from an interlocutory order or ruling. Cases of John W. Morris (2 P. D., 73) and Frank Bishop, jr. (8 P. D., 459).

Assistant Secretary M. W. Miller to the Commissioner of Pensions, March 10, 1904.

George P. Robertson, late a corporal in Company H, Thirty-fifth Michigan Volunteer Infantry, war with Spain, filed a claim for pension under the general law, June 12, 1899, alleging that at Camp Meade, Pa., on or about October 26, 1898, he contracted typhoid fever while at the division hospital, which had caused general and nervous debility. The claim was rejected April 16, 1901, on the ground of "no disability shown from any results of typhoid fever since filing claim."

Reopening was denied December 3, 1901.

He filed further evidence January 20, February 1 and 21, March 3 and 24, 1902, with a view of reopening the claim, and on August 14, 1902, the Bureau made the following call for evidence:

Claimant should state under oath the names of the diseases for which he claims pension as results of alleged typhoid fever, when each affection first appeared, with the signs and symptoms thereof, as then suffered by him. No further action can be taken until the foregoing has been complied with in detail.

From this action claimant's attorney appealed, November 10, 1902, contending that "such a ruling is little short of outrageous, and he does not believe sustained by the Government or of any fair-minded person," etc.

It has been held by the Department that no appeal will lie from any interlocutory order or ruling made in the adjudication of a claim, but that there must be a final adjudication and determination of the claim before an appeal may be filed. See cases of John W. Morris (2 P. D., 73), and Frank Bishop, jr. (8 P. D., 459).

At the time of filing this appeal said claim was pending before the Bureau unadjudicated, and said appeal comes within the decisions cited. The appeal is therefore dismissed and the papers in the case herewith returned.

MARRIAGE AND DIVORCE—EVIDENCE—IMPEDIMENT—NEW YORK LAWS.**ANNA E. CUMMINGS (AS WIDOW).**

The evidence fails to show the claimant's marriage to the soldier, contracted while she had a former husband living and undivorced, was contracted by her in entire good faith as to her former husband, as required by the statute and decisions of the courts of New York, and such marriage was, therefore, invalid and void, and she is not the soldier's widow.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 10, 1904.*

This appellant, Anna E. Cummings, on December 29, 1890, filed this claim, No. 491816, for pension under the act of June 27, 1890, as widow of Charles S. Cummings, who was a member of Company G, Twenty-ninth Michigan Infantry, from September 2, 1864, to September 6, 1865, and who died September 5, 1890.

Said claim was rejected February 15, 1902, on the ground that the claimant has failed to establish a valid marriage between her and soldier, the death or divorce of her first husband, Edward Cook, not being shown.

In appeal, filed April 3, 1902, she contended that her marriage to the soldier should be held valid, she being but 15 years of age when she married said Cook, who left her a few days only thereafter, and has never been heard of since, and she having been informed by an attorney that her marriage to him was invalid, and she having also subsequently been married to and later divorced from another man, named Thomas, prior to her marriage to the soldier.

On July 29, 1903, the papers were returned to the Bureau for a thorough special examination of the claim, and they are now retransmitted, with report showing the claim again rejected on the same ground, substantially, as before.

From the testimony secured on special examination it is manifest that the claimant's marriage in 1878 to the soldier was invalid and void because of her prior marriage, in 1864, to Edward Cook.

Her contention that her said first marriage was invalid because of her nonage at the time is not sustained by the evidence, which shows she was then 20 years of age. The age of consent in New York in 1864 was 14 years (Sally A. Fuller, 10 P. D., 238). Her marriage to said Cook, therefore, was valid, so far as her age was concerned.

Furthermore, her marriage in 1869 to Robert Thomas was, on September 1, 1876, duly declared, by judicial decree in Onondaga County, N. Y., on bill filed by said Thomas, to have been null and void because of her prior undissolved marriage to said Cook, who was shown by the evidence then adduced to have been living, and known to the claimant to have been living, as late as 1870.

Said Cook testifies in this claim that he was duly married in 1864 to the claimant, and was never divorced from her. Her marriages to said Thomas and the soldier were, therefore, void under the laws of the State of New York unless contracted in good faith after five years' absence, unheard of, of said Cook, and if so contracted were valid only until declared by a court of competent jurisdiction, and during the lifetime of the parties, to be null because of such undissolved marriage to said Cook (Anna Green, 12 P. D., 306).

The marriage to said Thomas having been, as above stated, so declared null, it has no bearing in this case. The validity of her marriage to the soldier, which was never declared null by any court, depended, therefore, upon the good faith of the parties in contracting it.

The statute of New York provides that—

If any person, whose husband or wife shall have absented himself or herself for the space of five consecutive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority. (Sec. 6, chap. 8, art. 1, vol. 3, p. 2332, N. Y. R. S.)

Under this statute the courts have held, as stated in *Mary N. Lester*, 12 P. D., 340, that a party claiming its benefits must show her remarriage was—

under an honest belief that her first husband was dead, said belief being a reasonable and just conclusion, based upon due diligence in ascertaining facts.

As pertinently stated in *Gall v. Gall* (114 N. Y., 109), a man—

can not shut his eyes and ears and justify a second marriage because for five years he did not hear of his wife. Did he try to hear of her? Did he make inquiries?
* * * Was he excused from inquiry by a false report of her death?

It is not shown that this appellant used any diligence whatever, in marrying the soldier, to ascertain whether her first husband was alive. That she could have without much trouble found out about him is manifest from the fact that his whereabouts were readily ascertained in the special examination of this claim through witnesses in the suit between her and her second husband, Thomas, in which suit she was personally served with process and personally answered the petition, denying, in her answer, the material allegations of the petition.

According to the testimony of said Thomas in that suit, she concealed from him the fact of her prior marriage until some time after their own marriage. Notwithstanding her answer in that suit, she did not appear on trial, and presented no evidence in denial of the facts stated in the petition or in support of her answer.

The claim has apparently not been adjudicated with reference to the good or the bad faith of the claimant in contracting her said marriage with the soldier, but it is evident from the facts shown that she did not exercise that due diligence to ascertain the facts as to her former husband which, under the statute and decisions of the courts of the

State, is essential to establish the validity of a second marriage under such circumstances as here existed. She has not, therefore, shown a valid marriage to the soldier, and can not be considered his widow. The rejection of her claim is affirmed.

DIVISION OF PENSION—PRACTICE—REIMBURSEMENT—ACT OF MARCH 3,
1899.

FREDERICK W. HYATT.

Prior to the adoption of any rules of practice governing appeal from Bureau actions in cases arising under the first three provisos of the act of March 3, 1899, and prior to departmental decisions in the case of *Ellis v. Ellis* (11 P. D., 288), pensioner filed an appeal, February 18, 1901, from the Bureau action of September 6, 1900, allowing his wife one-half his pension on the ground of his desertion of her. On August 27, 1901, he made due proof of service of a copy of his appeal upon the appellee.

Held, That said proof of service was, in the absence of any rule of practice to the contrary, an amendment of his original appeal, nunc pro tunc, and constituted a valid appeal from the date of filing.

Said appeal having been accepted and docketed as of the date of filing, the Bureau should have suspended payment to the wife of the one-half of the pension in controversy February 18, 1901, and pending the consideration of the appeal, and the continuation of the payment of one-half his pension to his wife subsequent thereto was error.

Said appeal having been sustained by the Department, and the Bureau action of September 6, 1900, appealed from having been reversed March 18, 1902, on the ground that the evidence failed to show that pensioner had deserted his wife within the meaning of said act of March 3, 1899, he is entitled to a restoration of all pension money accruing subsequent to the last quarterly payment next preceding February 18, 1901, which may have been withheld from him.

Pensioner having delayed for over five months to appeal from the Bureau action of September 6, 1900, he will be held to have waived his right to reimbursement of payments made the wife prior to his appeal, the Bureau having had complete jurisdiction of the claim on the part of the wife and the Bureau error being one of judgment or opinion merely, no error of law, fraud, or mistake of fact being involved.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 15, 1904.*

Frederick W. Hyatt, late private, Company H, Thirty-first Wisconsin Infantry, and a pensioner at \$24 per month under certificate No. 282188, appealed January 19, 1904, from the Bureau action of January 11, 1904, rejecting his claim filed January 2, 1904, for reimbursement of the sum of \$180 alleged to have been unjustly withheld from him and erroneously paid his wife under Bureau action of September 6, 1900.

Pensioner contends in his said appeal, in brief, that as the Bureau action of September 6, 1900, allowing his wife one-half of his pension was reversed by the Department on appeal, he was entitled to be reimbursed the sum paid his wife pursuant to said Bureau action, to wit,

the sum of \$180, being one-half his pension from August 4, 1900, to November 4, 1901, and that the Bureau erred in refusing to allow his claim for said reimbursement.

The grounds of rejection are fully stated in a communication from the Bureau to pensioner dated January 11, 1904, as follows:

The Bureau is in receipt of your letter of recent date, with which you forward your claim for "reimbursement" of the amount paid to your wife in her claim under the act of March 3, 1899, as your deserted wife in your certificate No. 282188, subsequent to the admission of her claim and prior to your appeal from the action of the Bureau to the honorable the Secretary of the Interior.

In this connection it is to be stated that the wife's claim was duly admitted September 6, 1900, and the United States pension agent was instructed to pay the beneficiary one-half your pension. On February 18, 1901, you appealed from the action of the Bureau. Your appeal was, however, defective, and was not considered until the proper remedy was applied by notifying the appellee of its filing. Suspension of payments to the wife was thereupon had pending the result of your appeal to the Secretary of the Interior.

On November 19, 1901, the Secretary decided that the claim should be reopened and that a special examination was necessary to determine the merits involved, and on March 18, 1902, after a thorough special examination, the Secretary's decision in the case reversed the Bureau action of admission, and the beneficiary's name was thereupon dropped from the rolls and the United States pension agent was instructed to resume payment of pension to you in its entirety.

The payments made to the wife in the absence of your perfected appeal were legal and proper under the practice of the Bureau as it prevailed at the time, and there is no valid or reasonable ground for reimbursement to you of the amount so paid, and your contention in this particular can not be entertained.

Should the wife be successful in her efforts to reopen the claim under any new evidence she might file, and should a corresponding decision be made in her behalf, you would hardly admit that the payment of one-half pension, if resumed to her, should begin from the date her name was dropped from the rolls and that she would be entitled to recover this amount from your pension.

In conclusion, it may be stated that the reversal of Bureau action was not based on an error of law, but one of judgment only, and a reopening of the case might again be had on behalf of the claimant under similar conditions if the showing warranted it.

Pensioner in his said application for restoration alleged that he was entitled to \$180 withheld from him and paid his wife, it being one-half of his pension from August 4, 1900, to November 4, 1901, and further alleged therein that on—

March 25, 1902, the Pension Bureau ordered the removal of said division to his said wife, and to pay said pensioner the entire amount of pension withheld, viz, \$180, from him. Again, on May 26, 1903, pensioner's pension was suspended, which said suspension was revoked by the Pension Bureau; and on July 8, 1903, pensioner was restored to the full right of drawing his full pension, and an order on the United States pension agent at Topeka, Kans., was made by the honorable Commissioner of Pensions to resume payment to the pensioner of his pension in its entirety, together with any portion thereof that may be withheld from him under instruction from the Pension Bureau.

He further alleged that the Bureau action, under which said payment was made, having been reversed by the Department on appeal

March 18, 1902, wherein it was held that "the evidence fails to show that pensioner deserted claimant," he is entitled to be restored to that of which he was deprived under said Bureau action.

It appears that prior to the adoption of any rules of practice governing appeal from Bureau actions in cases arising under the first three provisos of the act of March 3, 1899, and prior to departmental decision in the case of *Ellis v. Ellis* (11 P. D., 288), pensioner filed an appeal February 18, 1901, from the Bureau action of September 6, 1900, allowing his wife one-half his pension on the ground of his desertion of her. On August 27, 1901, he made due proof of service of a copy of his appeal upon the appellee.

The *Ellis* case, *supra*, was the first expression on the part of the Department on the subject of "notice" of appeals from Bureau action in cases under the act of March 3, 1899, involving division of pension, that being the first appeal in which the question arose. In that case it appeared that an *ex parte* special examination had been made, of which the wife had received no notice and of which she had no knowledge, and that she had no notice of the appeal from the Bureau action in her case. In disposing of pensioner's appeal in that case it was stated by Assistant Secretary F. L. Campbell, February 23, 1901, as follows:

I am clearly of the opinion that in cases of contest over the division of pension under the act of March 3, 1899, the appellee is entitled to notice of the appeal and a copy thereof and reasonable time in which to file a brief and argument in support of the Bureau action appealed from, and that in the absence of such notice to the appellee the appeal should not be passed upon by this Department.

As there is no rule of practice applicable to this class of cases requiring service of notice by the appellant, this appeal will not be dismissed, but the papers are returned to your Bureau with the order that Leroy Ellis, appellant, shall, within thirty days from the receipt of a copy of this decision, cause to be served on Emily Ellis, appellee, or her duly authorized attorney, a copy of his appeal in this case, and file in the Bureau due proof of said service; that within thirty days after receipt of said copy of appeal said appellee may, either in person or by her attorney, file in the Bureau a brief or argument in answer to the contention of the appellant, or in support of the Bureau action appealed from, whereupon the papers shall be forwarded by the Bureau to this Department for decision of said appeal.

It is to be noted that the appeal in that case which had been accepted and docketed as an appeal was not dismissed as invalid, but an opportunity was afforded the appellant to give notice thereof to the appellee in conformity with what the Department considered to be good practice.

On April 23, 1901, the Bureau, in a communication to the Department, requested to "be advised as to what would be considered by the Department as 'due proof' of service by appellant upon appellee of a copy of appeal taken," referring to said departmental decision in the *Ellis* case, whereupon the Department, on May 1, 1901, suggested what would be deemed *prima facie* "due proof" of service. (See *Conover v. Conover* 11 P. D., 525.)

These departmental decisions, together with the decision in the case of *Loughry v. Loughry* (11 P. D., 523), resulted in the adoption, November 2, 1901, of Rules 14 and 15, now Rules 17 and 18 of Practice (see *Van Houten v. Van Houten*, 12 P. D., 157), prior to which time there were no rules requiring service of a copy of the appeal upon the appellee, or in any manner regulating the practice in cases arising under said act of March 3, 1899.

In the case under consideration pensioner's appeal was accepted, filed, and docketed February 18, 1901, which was five days prior to the *Ellis* decision, and treated as a valid appeal as of that date in the various departmental decisions in the case, the Department being of the opinion that while no proof of service of a copy of said appeal upon the appellee was established prior to August 27, 1901, yet, in the absence of any rule of practice to the contrary, when established, it was in the nature of an amendment of the appeal, *nunc pro tunc*, thus constituting a valid appeal within present requirements from the date of filing.

In all the proceedings before the Bureau prior to the present the appeal has been treated as of February 18, 1901. In the first report accompanying the papers, April 23, 1901, it was stated:

Said claim having been allowed September 6, 1900, and an appeal having been filed therein, dated February 18, 1901, docket No. 67229, I have the honor to advise you that the rule promulgated by you in the *Ellis* case under date of February 23, 1901, has been applied and appellant notified thereof.

So, in all the proceedings before this Department, the case having been three times heretofore considered, first, on November 19, 1901, when a demurrer to the appeal was overruled and the case returned for special examination; second, March 18, 1902, when the Bureau action was reversed; and third, on June 30, 1903, when the wife appealed from the Bureau action of October 6, 1902, refusing to recommend a reopening of the claim (see *Hyatt v. Hyatt*, 14 P. D., 8), no question has been raised as to the proper date of the appeal or the sufficiency or validity of the appeal under the practice in vogue at that time. Pensioner did all that he was then required to do under the law, the rules, and the practice to constitute his appeal valid at the date it was filed and docketed, and the Bureau was thus fully advised that he questioned, by his said appeal, the legality of the Bureau action of September 6, 1900, under which his wife was being paid one-half his pension, and that he asserted his right and title to said money. While there was no rule of practice or departmental decision governing suspension of payment in such cases, yet the Department is of the opinion that the Bureau should have suspended payment to the wife of the one-half of the pension in controversy February 18, 1901, and pending the consideration of the appeal, and that the continuation of the payment of

one-half his pension to his wife subsequent thereto was error. (See first paragraph of Rule 13 of Practice, approved May 5, 1899.)

The first intimation to the Department as to the Bureau practice in this regard was on September 26, 1901, in the Bureau's response to departmental decision in the case of *Loughry v. Loughry* (11 P. D., 523), decided August 31, 1901. In that case the appeal was filed July 29, 1901, over five months subsequent to the Ellis decision, and nearly two months after departmental instructions of May 1, 1901, requiring proof of service of a copy of the proposed appeal upon the appellee to accompany the appeal in order to perfect the same. The appellant had failed to perfect his appeal by proof of service. He had filed a motion to suspend payment of one-half his pension to his wife pending the decision on his appeal. In dismissing his appeal and motion it was stated by the Department:

It will not be assumed that the Bureau would continue the payment of money to the wife while the question as to her right to receive the same was pending before the Department; but, as already indicated, the appeal in this case not being perfected by proof of service of notice the motion must also be dismissed.

On September 26, 1901, the Bureau, after quoting the above paragraph from the *Loughry* decision, made the following inquiries:

First. Whether it was the intention of the Department to hold that where a case has been allowed under the act of March 3, 1899, and an appeal filed, this Bureau is to suspend payment to the wife pending the decision of the appeal; and

Second. If suspension of payment to the wife is to be made pending an appeal in the act of March 3, 1899, cases, is it the desire that payment be made to the pensioner of the entire amount pending decision on the appeal, or to suspend the one-half the pension that may be due the wife?

The Department, in response to said inquiries, stated:

The legal effect of an appeal by either party from the Bureau action under the act of March 3, 1899, involving the question of a division of the soldier's pension is to suspend the payment of so much of the pension money as is involved in the action appealed from, and no more; i. e., one-half the amount of the pension from the date of filing the application therefor, under said act, or so much thereof as remains unpaid at date of filing a completed appeal.

As held by the Department in the case of *Adams v. Adams* (12 P. D., 377):

The same reason for withholding payment of the one-half of the pension, the title to which is in controversy, from the date of filing the appeal, applies equally to the suspension of payment of the one-half pension in controversy from the date of filing an application therefor under said act.

The application or declaration of a claimant under said act of March 3, 1899, like an appeal by claimant or pensioner, serves the purpose of a writ of supersedeas, or other similar writs, and should stay further Bureau proceedings, so far as they involve further payment of the one-half of the pension in controversy, pending the adjudication of the claim by the Commissioner of Pensions in the first instance, or pending the consideration of the appeal by the Secretary in the second. As substantially stated by the attorney for the appellee, they are analogous to writs of garnish-

ment or attachment in suits at law, and hold the property on statu quo, pending the determination of the question of title.

Such must necessarily be the legal effect of a declaration or appeal, in cases arising under said act, as otherwise claimants or appellants would be without an adequate remedy to protect their legal right, and the Government might be compelled to repay to claimants or pensioners money wrongfully paid to those found not entitled thereto under the law.

On March 18, 1902, after a thorough special examination, the Department sustained the appeal of pensioner on the ground that the evidence in the case failed to show that pensioner deserted his wife within the meaning of the act of March 3, 1899, which decision has since remained in full force.

In view of these facts the Department is of the opinion that pensioner is legally entitled to a restoration of all pension money accruing subsequent to the last quarterly payment next preceding February 18, 1901, which may have been withheld from him or paid his wife.

As to so much of his pension as was paid his wife prior to the date of filing his appeal, February 18, 1901, the Department is of the opinion that having delayed for over five months to assert his right or in any manner to question the legality of the Bureau action of September 6, 1900, he should be held to have waived, by his assent, acquiescence, and laches, his right to reimbursement of payments made the wife prior to his appeal. The Bureau had complete jurisdiction in the claim on the part of the wife. The only error on the part of the Bureau was one of judgment or opinion merely as to the sufficiency or weight of the testimony as to marital desertion. No error of law, fraud, or mistake of fact was involved.

So long as the Bureau action was unquestioned by the pensioner or unreversed or modified by this Department it was unimpaired, and justified the payment to the wife of one-half his pension under the first proviso of the act of March 3, 1899.

A clear distinction is to be observed between so much of this case as relates to reimbursement of payments made under such Bureau action prior to filing an appeal and cases where payments were erroneously made when the declaration or application was void and conferred no jurisdiction upon the Bureau to adjudicate the claim, as in the cases of *Richards v. Richards* (11 P. D., 77), *Henry R. Rothery* (ibid., 255), and *Kilmer v. Kilmer* (13 P. D., 270). In the cases last above cited the Bureau was required to reimburse the pensioners the full amount withheld from them and paid their wives because the declarations or applications of the wives in those cases were void, having been prematurely filed prior to six months from the passage of said act of March 3, 1899.

In the case under consideration the wife's declaration or application, based upon the first proviso of said act, was filed September 28, 1899.

over six months after the approval of said act. It was valid and contained all the allegations necessary to entitle her to one-half her husband's pension, if the allegations were properly supported by proof. The Bureau found the proof sufficient. The Department, which in this case is the appellate or supervisory power, found the proof insufficient. The payments to the wife prior to pensioner's appeal were regularly made under the Bureau action then in full force and effect, and in view of pensioner's acquiescence and assent, as evidenced by his silence and long delay in asserting his legal right to question the validity of said Bureau action by appeal or motion to reopen the claim, the Department is of the opinion that his right to reimbursement is limited in this case by his appeal to the amount withheld from him subsequent to the date on which he filed his appeal, as hereinbefore stated.

The Department is, however, of the opinion that the Bureau should have allowed so much of pensioner's claim filed January 2, 1904, as embraced reimbursement of payments made the wife subsequent to February 18, 1901, and for this reason the action appealed from is reversed.

The papers in the case are herewith returned with the suggestion that prompt action be taken to reimburse pensioner the amount to which he is entitled under the law and practice as herein construed.

It may not be inappropriate to state, in conclusion, that this is the first appeal in which the question of reimbursement of pension money disbursed to the wife prior to an appeal, under a Bureau adjudication which was reversed on appeal for error of judgment merely, has arisen.

Under the present code of practice, as now embodied in Order 69 of the Bureau, approved May 21, 1902, and amended May 20, 1903 (see *Bowman v. Bowman*, 14 P. D., 120), and Rules of Departmental Practice, Nos. 16 to 21, inclusive, copies of which are hereto appended, erroneous payments to either claimants or pensioners under the act of March 3, 1899, are not likely to occur. So far as this Department is advised, no errors in that regard have occurred since the adoption of said Order and Rules of Practice.

RULES OF PRACTICE BEFORE THE DEPARTMENT OF THE INTERIOR IN APPEALS FROM PENSION BUREAU ACTION IN CASES ARISING UNDER THE FIRST THREE PROVISOS OF THE ACT OF MARCH 3, 1899.

Rule 16.

Upon the adjudication of a claim for division of pension under the act of March 3, 1899, in the Bureau of Pensions, both parties will be promptly notified by the Bureau, by registered letter, of the action taken. Either party will be allowed thirty days from receipt of said notice to appeal from said action, the appeal to be accompanied by due proof of service of a copy thereof upon the appellee, as required by Rule 17. Unless such Bureau action is appealed from within thirty days from receipt of said

notice, the Bureau action shall be deemed to be final to the extent that all payments or divisions of pension in accordance with such Bureau action will not, in the absence of fraud or mistake of fact, be disturbed.

[Adopted and approved May 6, 1902.]

Rule 17.

Appeals from Bureau action in cases under the first, second, and third provisos of the act of March 3, 1899, should be accompanied by due proof of service of a copy of the appeal upon the appellee or his or her attorney of record.

Proof of service must be such as will satisfy the Department that the appellee has been informed of the appeal and the contents thereof, and may consist of, first, a written acceptance of service by the appellee or his or her attorney of record; or, second, a postal registry return receipt card, signed by appellee or attorney of record, accompanied by an affidavit, showing that on a certain date a copy of the appeal was mailed in a registered letter, postpaid, to the appellee or the attorney of record, addressed to a certain post-office (naming it); that the card was returned in acknowledgment of the receipt of such letter; or, third, an affidavit showing that on a certain day and at a certain place a copy of the appeal was personally delivered to the appellee or his or her attorney of record.

Appeals in this class of cases unaccompanied by due proof of service or a satisfactory reason why personal service can not be made will not be filed, docketed, or considered, but will be promptly returned to the appellant or his or her attorney of record for compliance with this rule.

[Formerly Rule 14. Adopted and approved November 2, 1901.]

Rule 18.

Appeals from Bureau action in cases under the first, second, and third provisos of the act of March 3, 1899, when accompanied by due proof of service of a copy thereof upon the appellee, will be filed, docketed, and numbered, and the Bureau of Pensions, the appellant, and appellee promptly notified thereof. The appeal will operate to suspend further payment of the one-half pension in controversy until a decision shall have been rendered therein by the Department, and the appellee will be allowed thirty days from the date of filing and docketing the appeal in which to file an answer, brief, or argument in opposition to the appeal or in support of the Bureau action appealed from.

[Formerly Rule 15. Adopted and approved November 2, 1901.]

Rule 19.

Appeals from the Bureau action in cases under the first, second, or third provisos of the act of March 3, 1899, should be confined to cases under that act, and not joined with an appeal from action in an invalid claim or claims under other acts of Congress, and when perfected by due proof of service of a copy of the appeal upon the appellee, as required by Rule 17, should be addressed to the Secretary of the Interior. This appeal should state the post-office address of the appellant and appellee and the certificate number and the service (company and regiment, etc.) of the pensioner, and should briefly, but specifically, state the error of law or fact complained of and the grounds relied upon for reversing or modifying the Bureau action appealed from.

No additional evidence upon the merits of the claim should be filed by either appellant or appellee, or considered on appeal.

[Adopted and approved February 25, 1903.]

Rule 20.

When, after appeal in cases under the first, second, or third provisos of the act of March 3, 1899, the case is remanded to the Bureau for further action, readjudication, and report, and the Bureau reports that the action appealed from is receded from or that the contention of the appellant is conceded to be well taken, the appeal will be dismissed and the appellee will be entitled to thirty days in which to appeal from the adverse Bureau action, during which period suspension of payment of the one-half of the pension in controversy will be continued unless the right of appeal is sooner waived by such appellee.

All rules and orders heretofore promulgated inconsistent with the foregoing are hereby abrogated.

[Adopted and approved February 25, 1903.]

Rule 21.

Motions for reconsideration of departmental decisions in cases for division of pension under the act of March 3, 1899, should be addressed to the Secretary of the Interior and refer to the docket number of the appeal, stating the names of the parties. The motion should briefly, but specifically, state the error of law or of fact in the decision sought to be reversed or modified and clearly indicate the grounds relied upon for reversing or modifying the decision, and may be accompanied by brief or argument in support thereof. The motion should be accompanied with due proof of service of a copy of the motion upon the opposite party or his or her attorney, as indicated in Rule 17 of Practice.

The opposite party will be allowed thirty days in which to reply to said motion, if desired, by answer, brief, or argument, and thereupon the motion will be promptly considered by the Department and a copy of the departmental decision or order, on the motion for reconsideration, will be duly forwarded to the parties or their attorneys by the Bureau of Pensions.

No motion for reconsideration of a departmental decision under said act shall operate to suspend payment of one-half the pension in controversy unless expressly directed by this Department.

The requirements of Rules 17 and 19 of Practice, as to appeals, are applicable to motions for reconsideration under said act.

[Adopted and approved October 28, 1903.]

EVIDENCE—BURDEN OF PROOF—JOINT RESOLUTION JULY 1, 1902—PRACTICE.

CATHARINE A., WIDOW OF ISAAC P. BROWN, ALIAS ALBERT B. COLE.

1. No burden of proof rests upon the Government, in an adjudication under section 2 of the joint resolution of July 1, 1902, to show a soldier received the bounty or gratuity referred to in that section; but the burden of proof rests alone, throughout said adjudication, upon the claimant to show to the satisfaction of the Commissioner of Pensions and the Secretary that said soldier did not receive such bounty or gratuity.
2. A claimant, in seeking to establish this fact, should produce all obtainable evidence tending materially to show the facts, circumstances, and conditions as regards payment or receipt of such bounty or gratuity of the soldier's second enlistment, and competent testimony upon this point is that of comrades, officials, or ex-officials of the State, county, or municipality where such enlistment was made, or other persons who were in a position to have personal or record knowledge of the matter of such bounty or gratuity.

3. A claim should not be rejected until the claimant has been called upon and given a fair opportunity to furnish such testimony.
4. Whether the evidence in any case establishes the fact that the soldier did not receive such bounty or gratuity is a question of judgment on all such facts, circumstances, and conditions shown.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 23, 1904.*

This appellant, Catharine A. Brown, widow of Isaac P. Brown, who served as Albert B. Cole in Company D, Fortieth Missouri Infantry from August 23, 1864, to August 18, 1865, and died March 4, 1891, was allowed pension as such widow in January, 1892, Certificate No. 320620, under the act of June 27, 1890, but in September, 1896, was dropped from the rolls on the ground that the soldier deserted March 1, 1863, and was never honorably discharged from a prior service in Company C, Fifth Iowa Infantry, in which he enlisted July 16, 1861, and on November 19, 1901, this action was affirmed on appeal.

On July 28, 1902, she filed a new claim under said act, and claiming the benefits of the joint resolution of July 1, 1902, which was rejected March 20, 1903, on the same ground upon which pension was withdrawn, and the further ground, as to the rights claimed under said joint resolution—

of the claimant's declared inability to prove that the soldier did not receive, at his last enlistment, bounty in excess of that to which he would have been entitled had he served faithfully until honorably discharged in his first service.

In this appeal, filed April 11, 1903, it is contended that the claimant should not be required to prove the negative as to receipt by the soldier of bounty as stated in the last rejection; that the best evidence obtainable fails to show, and there is no evidence tending to show, that he ever received any bounty whatever on his reenlistment, and that the burden of proof that he did receive such bounty should rest upon the Government.

This last contention contains no force. The burden of proof in any claim does not rest upon or shift to the Government, but rests upon the claimant alone throughout the adjudication of his claim. The rules of proof, and particularly those as to burden of proof which apply in the courts, do not in all respects or to the same extent apply in the ordinary adjudication of a pension claim; and such rules can not so apply to such adjudications because of the nature of the latter, they being *ex parte* proceedings in which it is incumbent solely upon the claimant to show, to the satisfaction of the Commissioner of Pensions and the Secretary, that he or she is entitled in all respects to the gratuity of pension claimed. The Commissioner or the Secretary may, in order to satisfy himself as to such title, require of a claimant

whatever, within reasonable bounds, in the way of evidence he may desire; and the principal question in any case is as to the reasonableness of any such requirement, which must depend largely upon the facts and the evidence in that particular case.

While the law alone determines what facts or conditions shall entitle to pension, the Commissioner of Pensions and the Secretary determine, generally, what shall be competent and sufficient evidence and proof of such facts and conditions. In this case it is no objection to the Commissioner's action that "proof of a negative" is required of the claimant. The law itself necessitates such proof. It provides (section 2 of said joint resolution):

That in the administration of the pension laws any enlisted man of the Army, including regulars, volunteers, and militia, or any appointed or enlisted man of the Navy or Marine Corps, who was honorably discharged from the last contract of service entered into by him during the late war of the rebellion, shall be held and considered to have been honorably discharged from all similar contracts of service previously entered into by him with the United States during said war:

Provided, That such enlisted or appointed man served not less than six months under said last enlistment or appointment, that his entire service under said last enlistment or appointment was faithful, and that he did not receive by reason of said last enlistment or appointment any bounty or gratuity other than from the United States in excess of that to which he would have been entitled if he had continued to serve faithfully until honorably discharged under any contract of service previously entered into by him, either in the Army, Navy, or Marine Corps during the war of the rebellion.

One of the facts which, on proof, entitle a claimant to the benefit of said law, is that the soldier "did not receive" the bounty referred to. The requirement made of this claimant, therefore, is not a mere gratuitous rule of the Commissioner of Pensions, prescribed by him under his discretionary power for the purpose of satisfying himself of the claimant's title to the benefits of the law, but it is a positive, express statutory condition upon which, in part, the claimant's title to such benefit is by the law, predicated and under the law depends, substantively and essentially. The law requires that she show this soldier "did not receive" such bounty or gratuity, and it rests with the Commissioner and the Secretary merely to decide whether the evidence in the case satisfactorily shows this negative fact required by the law.

There is, in this case, not a particle of evidence tending even to show that the soldier ever received any bounty or gratuity on account of any or all of his service except \$66.66, two-thirds of the amount of bounty payable under the act of July 22, 1861, which portion of said amount was paid him on his second enlistment in accordance with the provisions of that act, and under that act he would have been entitled, under his first enlistment and upon an honorable discharge therefrom, to no more than \$100.

It is shown by the records of the National Government that he received only this sum of \$66.66 bounty, and no more; and the only

question in the case is whether he received any local bounty in addition. As to this, there is, as stated, no evidence whatever. There is no State, county, municipal, or other record or evidence showing, or tending to show, either that he received any local bounty or that any local bounty was paid to anyone on account of service in said organization in which he enlisted, or in any other service at that time in that State (Missouri) or county or city. It is stated on a slip attached to the brief face, the authority for which statement is not given, that the State of Missouri paid no bounties. The adjutant-general of the State certifies merely that he has no records of the payment of bounty during the civil war; and the auditor for the city of St. Louis, where the soldier's second enlistment was made, certifies that he also has no such records. The claimant refers in one statement to a letter of the lieutenant of the soldier's company, in his second service, which letter is not found in the files, that he knows nothing of any bounty to the soldier.

It appears from slips in the case that the rejection is based upon the fact that the soldier enlisted in his second service under an assumed name and at a time during the war when large sums of money are "well known" to have been paid as bounty, from which facts it is inferred as probable that he received such a bounty in addition to that noted; and this inference is taken to be so strong that there must be "positive evidence" that no such bounty was in fact paid him.

Neither of these facts, however, has any tendency whatever to show the soldier received any other bounty than that shown of record. His known desertion from his first service was, of itself, sufficient reason for his assuming, on again enlisting, another name, so as to avoid discovery of and punishment for such desertion.

There is no basis in the evidence for supposing he assumed such name in order to secure bounty, because it is not shown that any bounties were paid to, or received by any in such proximity to his enlistment, in point of time or place or organization, as to render it at all probable that he received a "large sum" as additional bounty. There is no "well-known" fact that members of this organization received such sums, or that such were paid at that time and place; all or some, at least, of which facts should be definitely shown in order to give rise to any particular inference from the evidence that this soldier received such bounty.

The mere fact, well known though it may be, that large bounties were paid generally about this time of the war—the fall of 1864—because of the exigencies of the service at that period, is not alone sufficient upon which to base the rejection of a claim. It shows a possibility only, and no, or but little, probability that such bounty was paid in any particular case, and each case should be thoroughly investigated to determine its own facts as to such matter.

This claimant has conformed to all requirements possible for her, it seems, to conform to, by producing evidence that there is no State or local record showing any payment of bounty to this soldier or to any of his organization. Her request for the post-office addresses of comrades, that she might secure their testimony in her case, was denied, as appears from slip attached to the brief face, because the State paid no bounties.

This request might well have been granted. If it were shown that others enlisting at the same time and place received additional bounties there would be some basis for holding it not satisfactorily established that he also did not receive such a bounty. In fact, it might have been definitely shown that he did not receive such bounty or that he did. The fact that the State paid no bounties was not conclusive against the claimant, rather in her favor, and there may have been bounties paid by the local, county, or municipal organizations, although no record of such payments be extant. The testimony of comrades, and possibly of others, city and county ex-officials now living who were in a position to have known of the facts as to such bounties and as to the circumstances of enlistment, might properly have been secured.

A proper and fair adjudication under said second section of said joint resolution would appear to require that a claimant be called upon to furnish the affidavits of such comrades and ex officials and others in a position to have had personal knowledge of the facts as to such bounties, and all the conditions of the particular enlistment in question, as well as the record evidence obtainable locally from State, county, or municipal officers, and upon such a *prima facie* showing that special examination be ordered, when deemed advisable, as in other cases.

In this case, however, no such further particular adjudication appears to be necessary to a satisfactory decision of the question herein. The claimant has shown that there is no record as to payment of local bounty or other gratuity to this soldier or to any of his organization; and there is nothing whatever tending to any extent to show that he received any such bounty or gratuity, or that any such was paid. The natural and necessary inference is that he did not receive any bounty or gratuity other than that paid him by the National Government. The claimant has therefore satisfactorily established, *prima facie*, her right to the benefit of said second section of said joint resolution, and the rejection of her claim is reversed for readjudication accordingly.

DISCHARGE—DESERTION—JOINT RESOLUTION OF JULY 1, 1902—ACT
JUNE 27, 1890.

BRIDGET WHELAN (WIDOW).

The "bounty or gratuity" specified in the second section of the joint resolution of July 1, 1902, comprises only those additional governmental benefits conferred or compensations paid, other than pay and pensions, for or on account of military service rendered or to be rendered, and does not include the consideration paid to a substitute soldier by his principal under their private contract whereby the former agrees to serve in the place and stead of the latter.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 26, 1904.*

This appellant, Bridget Whelan, on September 9, 1898, filed a claim, No. 682322, for pension under the act of June 27, 1890, as widow of Edward Whelan, who was a member from February 16, 1865, to September 5, 1865, of Company K, Thirteenth Indiana Infantry, and who died September 2, 1898.

Said claim was rejected November 2, 1900, on the ground that the soldier had deserted and was never discharged from a prior service in the Fourteenth Missouri Cavalry, the War Department having refused to remove the charge of desertion or to grant an honorable discharge from such service.

On August 23, 1902, she filed another claim under the provisions of the act of May 9, 1900, amendatory of the act of June 27, 1890, and the provisions of the joint resolution of July 1, 1902, and on April 13, 1903, both claims were rejected on the same ground as before, and the further ground that on his second enlistment the soldier received a bounty or gratuity other than from the United States in excess of that to which he would have been entitled had he served faithfully to the end of his first enlistment.

In appeal filed April 30, 1903, it is contended that this second ground of rejection is not in accordance with the evidence.

It has been held by the Department that to entitle to pension under the act of June 27, 1890, there must have been an honorable discharge of the soldier from all service contracted by him to be rendered during the war of the rebellion (Sarah Bush, 9 P. D., 144); and that this holding is not wholly abrogated by said joint resolution, but is only modified thereby to the extent that a soldier who was honorably discharged from his last service in said war "shall be held and considered" to have been honorably discharged also from "all similar contracts of service * * * during said war" when the conditions of the proviso of the second section of said joint resolution are shown to have existed. (Daniel G. Peterson, 13 P. D., 346.)

This case rests alone, therefore, upon the decision of the question, under said proviso of said joint resolution, whether this soldier received—

* * * by reason of said last enlistment or appointment any bounty or gratuity other than from the United States in excess of that to which he would have been entitled if he had continued to serve faithfully until honorably discharged under any contract of service previously entered into by him, either in the Army, Navy, or Marine Corps, during the war of the rebellion.

As to this question, the records of the War Department show the soldier reenlisted (in said Company K) as a substitute, and that he then “acknowledged under oath to have agreed with his principal to become his substitute in the military service for a sufficient consideration paid and delivered to me (Whelan) on the 16th day of February, 1865.”

It is thus conclusively established that this soldier did receive, for his services in reenlisting, some consideration other than a bounty or gratuity from the United States; and the question first arising is whether such consideration, moving from a principal to a substitute, is “bounty or gratuity” within the meaning of said joint resolution.

Such consideration conforms to the general definition of “bounty” as given in Bouvier’s Law Dictionary, “an additional benefit conferred upon, or a compensation paid to, a class of persons.” (Vol. 1, p. 261.)

In military law, however, the term has been confined exclusively to those additional benefits conferred, or compensations paid, by the National, State, county, town, or municipal governments, to induce enlistments in the military service, or to further the military purposes of the Government, and has not been extended to those benefits or compensations passing between individuals under their private contracts as consideration binding them primarily in their relations toward each other, and only secondarily affecting either in his relations toward the Government. (See 15 Am. and Eng. Enc. of Law, (o. s.) p. 445 et seq.; (n. s.) p. 670 et seq., and the numerous decisions there cited.)

A “gratuity” is not essentially different, though distinguishable, from a “bounty,” in the sense of the latter word as used in military law as above defined, and was evidently here employed to indicate the different legal effects which follow a bounty the right to which is conferred prior to enlistment or to rendition of the service on account of which it is given, and one the right to which is conferred subsequent to such enlistment or to rendition of such service; the former bounty, or promise thereof, being held to give rise, upon rendition of the service, to a contractual relation, which may base a legal action for recovery of such bounty even should the law conferring it be repealed, while the latter bounty is wholly gratuitous, for recovery of which no

action will lie if the law be repealed prior to actual payment of the bounty. (See the decisions cited in above digests.)

It is stated by Sutherland on Statutory Construction, section 254, that words in common use having a technical meaning "will be understood in a technical sense when the act treats of the subject in relation to which such words are technically employed."

Also in section 255, that—

Where words have been long used in a technical sense and have been judicially construed to have a certain meaning, and have been adopted by the legislature as having a certain meaning prior to a particular statute in which they are used, the rule of construction requires that the words used in such statute should be construed according to the sense in which they have been so previously used.

The compensation received by a substitute from his principal in consideration of the former performing the service legally devolving upon the latter is not a "bounty" or a "gratuity" in either the popular or the legal sense of these words; and they, as used in said joint resolution, must be held to mean only what, in both popular and legal understanding, they have been universally considered to mean—viz, as above stated, those additional governmental benefits, aside from pay and pension, granted for or on account of military service rendered or to be rendered.

It is therefore held that the consideration paid to a substitute soldier by his principal under their private contract, whereby the former agrees to serve in the place and stead of the latter, is not "bounty or gratuity" within the meaning of said joint resolution, and does not debar such soldier or his widow from the benefits to be derived under section 2 of said joint resolution.

The nature or amount of the consideration received by this soldier from his principal is therefore immaterial, and it is necessary only to be shown, to entitle the claimant to a holding herein, that the soldier was honorably discharged from his former service during the war of the rebellion; that (1) his service under his last enlistment was of six months' duration; (2) that such service was faithful, and (3) that he received no bounty or gratuity, as above defined, other than from the United States, in excess of that to which he would have been entitled if he had continued to serve faithfully until honorably discharged from such former service.

The records of the War Department show his last service exceeded six months and was faithful, and there is no record or other evidence that he ever received any bounty or gratuity whatever from any governmental agency—National, State, or municipal.

It appears from the statements in the case of the claimant's attorney that the report of the adjutant-general of the State of Indiana for the period of the war (vol. 1, p. 74) shows "no premiums or bounties were offered or paid by the State."

The auditor for Laporte County, Ind., where this soldier enlisted, also certifies that that county had no part in the payments of bounties, but each township had its separate organization for collecting and disbursing them, and that there are no records as to such bounties, either of the county or of the township, on file or to be found.

It is stated that the soldier himself in 1889, when applying to the War Department for the removal of the charge of desertion and the granting of an honorable discharge from that service, stated his last enlistment was not made for the purpose of receiving any bounty or other gratuity that he would not be entitled to had he remained in his former service.

The claimant states that had the soldier received any bounty or other gratuity he would have sent it to her and she would have known it, but he sent her only \$5 on his reenlistment, and in June or July next thereafter \$100, and for fifteen months of his former service he sent her nothing, claiming he had not received his pay.

There is no evidence whatever tending to show this soldier ever received any bounty or gratuity, and it can not be assumed that he did receive any. All sources of information appear to be exhausted; the proof is as complete as the case is susceptible of, and the claimant can not be held to impossible proof. This joint resolution is remedial in character, and should be liberally construed and applied, and its benefits accorded those within its perview who reasonably appear to have fulfilled the conditions in fact specified as entitling to such benefits. It is reasonable to suppose that had this soldier received any such bounty or gratuity this claimant and others would have been cognizant thereof, and the fact that none is, so far as appears, tends negatively to prove there was no such bounty or gratuity.

The soldier should, therefore, be held and considered to have been honorably discharged from his former service or services, and the action appealed from is reversed accordingly.

MARRIAGE—SLAVES—LAWS OF FLORIDA. ACT OF JUNE 27, 1890.

BETTIE RANKINS (WIDOW).

The slave marriage between claimant and sailor was of no force or effect under the laws of Florida, where they resided, there having been no cohabitation between them after their emancipation.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 30, 1904.*

This appellant, Bettie Rankins, on July 17, 1903, filed this claim, No. 22619, for pension under the act of June 27, 1890, as widow of John Rankins, who was a first-class boy in the United States Navy,

serving on the vessels *J. L. Davis* and *Hendrik Hudson*, during the war of the rebellion, and died March 10, 1902.

Said claim, and also her claim for his accrued pension, certificate No. 30278, was rejected January 5, 1904, on the ground that she is not his widow, there having been only a slave marriage between them, which was not validated after emancipation; and she appealed January 19, 1904, contending she is his widow under the laws of Florida, where both he and she resided at the time of his death.

It is shown by the testimony both of the sailor, on special examination in 1901 under his claim, and of this appellant, that the only marriage and cohabitation between them was as slaves, prior to said war, and that they did not even see each other after their emancipation.

Marriage among or between slaves was not recognized by the laws of Florida as a civil institution of any legal force or effect whatever. In the case of *Daniel v. Sams* (17 Fla., 487) the court stated:

While the American courts admit that there is a moral obligation, which natural law imposes, in the relation of husband and wife among slaves, still, as remarked by a learned judge, its legal consequences must flow from the municipal law. This does not recognize the marriages of slaves. * * *

And as to the construction and effect of the act of December 14, 1866, of the Florida legislature, providing that—

In all cases where colored persons have resided and lived together as husband and wife, and have before the world recognized each other as husband and wife, they shall be deemed and taken to be husband and wife, as fully and lawfully as if the marriage had been solemnized by a proper officer legally authorized to do and perform the same * * * (McClellan's Digest, Laws of Florida, page 753)—

the court states:

A consistent and harmonious operation of the acts of December 14, 1866, and December 12, 1866, restricts the operation of the act of December 14, 1866, to a living together as husband and wife since emancipation. The language of the act is broad enough to cover a slave marriage, but to give it that construction would bring it into conflict with the express language and operation of the act of December 12, 1866 * * * In this case there is not even a pretense of a cohabitation by the parents of the appellants at any time since the emancipation of their mother, and we have no doubt at all that the legislature in this act did not refer to a cohabitation as husband and wife incident to a customary slave marriage.

And in the case of *Williams v. Kimball* (35 Florida, 49) the court stated, citing the former case—

In this State it has been settled for years that the offspring of such (slave) marriages, which have never been recognized by the parties thereto after they became free persons and capable of making such contract of marriage, have no inheritable blood; they can not inherit property left by their ancestors after emancipation.

It is obvious, therefore, that no lawful or valid marriage ever existed between this claimant and the sailor, and she is not his widow. Rejection of claim is affirmed.

DIVISION OF PENSION—NECESSITOUS CIRCUMSTANCES—EVIDENCE.

VOGLER *v.* VOGLER.

Claimant, 54 years of age, is in the sole and undisputed possession and enjoyment of a homestead in the State of New York, valued at \$1,600; has \$50 in cash, and has received from pensioner \$50 July 10, 1903, and \$20 September 16, 1903.

The title to the real property, which is unencumbered, is jointly in claimant and pensioner, their interests being that of tenants by the entirety.

Pensioner, 66 years of age, is not shown to be in possession of any means of support other than his interest in said homestead, his pension of \$12 per month, and the right to admission to a Soldiers' Home.

Held, that claimant is not shown to be in necessitous circumstances within the meaning of the act of March 3, 1899.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, March 30, 1904.

Mrs. Elizabeth Vogler appealed February 8, 1904, from the Bureau action of January 8, 1904, rejecting her claim filed October 27, 1903, for one-half the pension of her husband, John Vogler, a pensioner at \$12 per month under certificate No. 1003567, wherein it was held that—

Claimant is not in necessitous circumstances within the meaning of the act of March 3, 1899. Other points not considered.

It is contended on behalf of claimant by Edgar Jackson, esq., her attorney, as follows:

The appellant specifically states as error in the Commissioner's decision his finding that the claimant is the owner of one-half interest in a home and certain real estate, whereas her interest in said real property is that of a tenant in the entirety, which holding she can not sell or mortgage unless the pensioner joins in the deed of mortgage, which he refuses to do.

In the case of *Hunter v. Hunter*, decided in P. D. August 17, 1903, the grounds for the rejection of a similar claim are clearly set forth. They show that the claimant was the absolute owner of certain real estate which had a rentable value, and her ability to earn money as compared with the pensioner's was not in her favor. So in the other cases cited in the opinion of *Hunter v. Hunter*.

Under the laws of the State of New York, where the pensioner in this case formerly resided, and where the claimant now resides, the estate held by John Vogler and his wife Elizabeth is clearly defined. The following cases are cited:

Bertles v. Nunan, 92 N. Y., 152.

The opinion of Judge Harl in this case, at page 156, states:

"By the common law, when land was conveyed to husband and wife, each became seized of the entirety, and upon the death of either, the whole survived to the other. During the joint lives the husband could for his own benefit use, possess, and control the land and take all the profits thereof, and he could mortgage and convey an estate to continue during the joint lives, but he could not make any disposition of the land that would prejudice the right of the wife in case she survived him."

This case further goes on to enumerate the different statutes enacted in the State of New York, which it was also claimed in this case modified the common law, and the opinion concludes that the common-law doctrine of a tenancy by the entirety

was not abrogated by these married women's acts enumerated; that the estate still exists in full force and effect. (See also *Zerntlien v. Bram*, 100 N. Y., 12.)

The common-law rule still exists where there is a tendency by the entirety. Neither husband nor wife can convey to a third party without the assent of the other in writing, and this is still in force in New York State. (See also *Minor v. Brown*, 133 N. Y., 308.)

In this case a clear distinction is drawn between a tenancy in common of husband and wife, and a tenancy in the entirety of the husband and wife, and the different rights of the husband and wife in these two cases are clearly set forth. (See also *Hiles v. Fisher*, 144 N. Y., 306.)

In this case it is held that while the common-law doctrine of a tenancy by the entirety was not abrogated by the married women's acts in the State of New York, yet the effect of these acts upon the tenancy was such that during her lifetime a wife was entitled to one-half of the rents and benefits of such estate.

While this decision holds that the husband had the right to mortgage his interest in such estate, it will be noticed that there is no decision that the wife was ever relieved from her common-law disability to mortgage her right in such estate, the theory of the law being that there must be a clear intent expressed in the statutes modifying the common-law doctrine to give her such a right.

This has never been held in any case I have seen reported in New York State.

The wife can not sell or mortgage her property where she holds as one of the tenants in the entirety, unless her husband joins in such mortgage or conveyance. (See also case of *Grosse v. The City of Rochester*, 148 N. Y., 235.)

It is respectfully submitted that the previous decisions of the Division of Pensions, *Hunter v. Hunter*, and the cases therein cited, are not applicable to this case, and that the decision of the Commissioner of Pensions should be reversed and the claim of *Elizabeth Vogler* should be granted.

Pensioner, in answer to said appeal, contends as follows:

I deny in toto that I ever refused to sell the property mentioned in my wife's contest on appeal, and assert that she never made a proposal to me to sell. On the contrary, I wrote her in September, 1903, offering to sell, and on February 25, 1904, I wrote to Arthur N. Bridley, real-estate agent at Hempstead, Nassau County, N. Y., requesting him to sell the property, and to inform me if my wife would give her consent to the transaction. I have as yet received no communication from either of the parties named relative to my requests. I am still willing to sell the property in question if I can obtain the consent of my wife to do so.

While the evidence in this case is not sufficiently full or specific to justify the Department in passing upon the question of title to the real estate in question, even if such question was material, yet it may be assumed for the purposes of this decision that the title is jointly in claimant and pensioner, their respective interests being that of tenants by the entirety, and that claimant can not, during the lifetime of the pensioner, mortgage, incumber, or convey the same, or her interest or estate therein, without the consent of her husband, the pensioner. The facts remain, however, as disclosed by the evidence in the case, that claimant is in the sole and undisputed possession and enjoyment of said estate, consisting of a dwelling house, barn, and about an acre of land, and which appears to comprise the homestead; that said property cost \$1,500 cash in 1903, and which has been improved by the addition of a barn costing about \$100. She received

from pensioner \$50 July 10, 1903, and \$20 September 16, 1903, at which latter date pensioner also paid \$10 to a doctor, which he claims was for her benefit. Claimant still had \$50 on hand December 18, 1903, which she claims she is saving in case of sickness or death. Claimant is but 54 years of age and the only evidence indicating any physical impairment is the testimony of one witness, who in an affidavit stated that claimant "has not a very strong constitution." She is not shown to be in need of food, clothing, medical attention, or shelter, which are usually referred to as constituting the absolute necessities of life. But the term "necessaries" is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term which must be applied to the circumstances and condition of the parties.—*Bouvier's Law Dictionary*, vol. 2 (15th ed.), 278.

To entitle claimant to one-half her husband's pension she is required to show that she is in necessitous circumstances. *Ashley v. Ashley* (13 P. D., 205.) By the term "necessitous circumstances" in the act of March 3, 1899, as applied to the condition of the wife, is meant her need of those necessities which are suitable to her situation and her husband's condition in life, and which he is bound to provide, or for which he is liable on an implied contract in case he fails to provide.

The financial, physical, and social condition of the pensioner are facts to be considered in connection with other facts in the case in determining the actual necessitous condition of the claimant under said act. *Fisher v. Fisher* (12 P. D., 336-339), and *Hunter v. Hunter* (14 P. D., 136).

Pensioner is 66 years of age and is not shown to be in possession of any means of support other than his pension of \$12 per month. He is also entitled to the benefits of a Soldiers' Home, of which he is now availing himself, he having entered the United States Soldiers' Home at Washington, D. C., July 7, 1903. He appears to have left claimant June 27, 1903, for the Home. She filed her claim four months later for one-half his pension, based on his being an inmate of a Soldiers' Home. During these four months he appears to have paid her \$70, according to her admission, which is \$22 more than the entire amount of his pension during that period. Claimant does not contend, and pensioner denies, that he has abandoned her. The sole question presented is whether or not at the date of filing her said application and since, she was in necessitous circumstances, and whether or not, under the evidence before the Bureau at the date of the adjudication, any error was committed in the rejection of the claim upon the ground stated. The question of marital desertion is not involved, as the wife's claim is not based upon the first proviso of said act of March 3, 1899. See *Hayes v. Hayes* (13 P. D., 212.)

There is nothing to indicate that the Bureau failed to consider the real character of claimant's title to the real estate, she having testified in an affidavit filed December 22, 1903, that the deed of the property was made to her and pensioner "jointly," or that the Bureau erred in its adjudication.

Said action is accordingly affirmed.

SERVICE—ACT JUNE 27, 1890—EVIDENCE—RECORD.

CHARLES W. PARKER.

The claimant having made due proof of the number of days, service required by section 2 of the act of June 27, 1890, if he meets the other requirements of said act is entitled to a pension, notwithstanding the holding of the War Department that he is not regarded as having been in the military service of the United States.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 31, 1904.*

Charles W. Parker was pensioned under the act of June 27, 1890, as a former private in Troop G, Fifteenth New York Cavalry, at the rate of \$6 per month, because of partial inability to earn a support by the performance of manual labor, resulting from injury of left foot, from July 26, 1890, to October, 1895, when his name was dropped from the pension roll on the ground that he was not regarded as having been in the military service of the United States. A claim for restoration, filed April 11, 1896, was rejected in July, 1896, on the ground that the claimant is not regarded as having been in the United States service, as shown by the records of the War Department. This action having since been adhered to, an appeal was filed June 19, 1903, which contends that the rejection was erroneous, as the claimant served and was paid for more than ninety days' military service in the late war of the rebellion.

In a report from the War Department, dated April 30, 1891, it is stated that the claimant was enrolled July 30, 1863, mustered out November 29, 1864, and that his individual muster-out roll bears the following indorsement:

In accordance with instructions of June 9, 1866, from the Adjutant-General's Office, as indorsed on the papers in his case, Private Charles W. Parker, Troop G, Fifteenth New York Cavalry, will be honorably discharged from the service, as of date November 29, 1864, with pay and allowance as a private from November 11, 1863.

By command of Major-General Hooker.

In June, 1895, the War Department in a report stated that in the absence of any record evidence of the claimant's muster into the service, he is not regarded as having been in the military service of the United States.

Your Bureau called upon the War Department, under date of August 7, 1895, for a report as to whether the claimant actually performed any military service subsequent to the date of his enrollment. The report of the War Department, dated August 9, 1895, is as follows:

Respectfully returned to the Commissioner of Pensions with the information that Charles W. Parker was drafted July 23, 1863, from Caroline, Tompkins County, N. Y., and exempted from service September 10, 1863, by reason of loss of teeth.

Upon his individual muster-out roll as of Company G, Fifteenth New York Cavalry, which shows him mustered out July 17, 1866, to date November 29, 1864, it is stated that he was enrolled for the Fifteenth New York Cavalry July 30, 1863. There is no other record of his enrollment and no record of his muster into the service.

He was arrested as a deserter as of Company G, Fifteenth New York Cavalry, November 11, 1863, by the provost-marshal Twenty-third district of New York and delivered at Fort Columbus, New York Harbor, November 18, 1863, the following remarks appearing upon the provost-marshal's records: "Never went to his company and not mustered in; drafted and released from draft July 25, 1863."

In December, 1863, the commanding officer, Fort Columbus, N. Y., under instructions from department headquarters, relieved him from the charge of desertion and transferred him to the invalid corps, but his name has not been found upon the records of any organization of that corps.

Some time in August, 1864, he was sent to the Fifteenth New York Cavalry, and on the muster roll of Company G of that regiment, dated October 31, 1864, he is reported present, and on the muster roll dated December 31, 1864, he is reported discharged by order November 29, 1864.

In his declaration on file he stated that after having enlisted in the Fifteenth New York Cavalry he was told that he ought not to have enlisted and that he could be held under the draft; that he went to Owego, August 4, 1863, and was told by the provost-marshal Twenty-sixth Congressional district, New York, that the enlistment was null and void and that he must report under the draft; that he did report and was exempted on August 29, 1863, and then went home, supposing that this was the end of his military career; that after his arrest he was released from the charge of desertion and transferred to the invalid corps, but was never sent to it; that he remained at Fort Columbus, N. Y., until August 18, 1864, when he was sent to City Point, and reported to his regiment on September 20, 1864.

W. M. Boyer, late captain Company G, Fifteenth New York Cavalry, in his statement on file, said that a few days after he enlisted Parker he learned that he had been drafted prior to his enlistment; that Parker reported to the board of enrollment and received exemption papers which he showed him (Boyer), and that he then destroyed Parker's enlistment papers.

Lieutenant-Colonel Hyde, late of the Fifteenth New York Cavalry, in his statement on file, said that Parker reported to the regiment in August, 1864, it being said that he was sent there as a deserter; that Parker remained with the regiment until about November 28, 1864, when he received a pass to go home with verbal orders to remain there until called for, there being no papers to show that he belonged to the service.

As stated in the report of June 7, 1895, from this Office, this man is not regarded as having been in the military service of the United States.

The papers in this case were returned to your Bureau February 17, 1904, with instructions to request the War Department to state whether the claimant is now regarded as having been in the military

service of the United States. Under date of February 26, 1904, the following call was made by your Bureau:

Respectfully returned to the chief, Record and Pension Office, War Department, by direction of the honorable Assistant Secretary of the Interior, with the request that he will please state whether the within-named soldier's military status has changed, and whether he can not be considered as constructively mustered in according to the circular of the War Department of June 18, 1903 (pp. 23, 24, and 74), in which the subject of constructive muster in is discussed. Is he now regarded as having been in the military service of the United States?

The War Department reported under date of March 1, 1904, as follows:

The status of the within-named Charles W. Parker has not been changed since the date of the accompanying indorsement of August 9, 1895, from this Office. He was not in the military service of the United States in Company G, Fifteenth New York Cavalry.

In the circular of the War Department referred to above, dated June 18, 1903, which, it is stated, will govern the practice of the War Department in the future, appears the following relative to constructive muster in:

Before the War Department recognized the fact that there can be a constructive as well as an actual muster in, it was generally held that a volunteer or a militiaman who had not been actually mustered into the United States service, even though he had been received into that service under conditions that are now recognized as constituting a constructive muster in, was not entitled to the rights or benefits that are provided by law for persons who have been in the military service of the United States. For the purpose, evidently, of removing the inequitable effect of this holding in the administration of the pension laws, a provision of law that is now embodied in the first paragraph of section 4693, Revised Statutes, was enacted. That provision gives a pensionable status to every officer or enlisted man who has been in the military or naval service of the United States, or in its marine corps, whether regularly mustered or not. That is to say, those who were actually in the United States service, although not formally mustered into that service, acquired the same pensionable status under that law that was previously held by persons who had been formally mustered into service. In other words, the words "whether regularly mustered or not," as used in the first paragraph of section 4693, Revised Statutes, bring within the terms of that paragraph those who have been constructively mustered into the United States service, as that term is now understood by the War Department, as well as those who have been actually mustered into the United States service. This provision, in effect, simply recognizes the fact that there can be a constructive muster in which is the equivalent of a formal muster in, and the War Department has recognized the same fact for many years.

On page 74 of this circular it is stated that:

The equivalent of muster in, or constructive muster in, in the cases of volunteers or of militiamen called out by the President, is such treatment of those volunteers or militiamen by the United States, through its own agents, as clearly shows the intention of the United States to accept those volunteers or militiamen into its own service and to make them its own soldiers, free from all control as soldiers except the control of the United States. That intention is manifested by the United States placing the men on military duty, uniforming, arming, equipping, subsisting, and

paying them, and taking their names up on the official rolls—in short, by treating them substantially as the United States treats soldiers who have been formally mustered into its service.

Section 2 of the act of June 27, 1890, provides—

That all persons who served ninety days or more in the military or naval service of the United States during the late war of the rebellion and who have been honorably discharged therefrom, * * * shall, upon making due proof of the fact according to such rules and regulations as the Secretary of the Interior may provide, be placed upon the list of invalid pensioners of the United States, * * *

Has this claimant made proper proof of service of ninety days or more as required by this act? The War Department held in June, 1895, that:

In the absence of any record evidence of his muster into the service, this man is not regarded by this Department as having been in the military service of the United States,

and has twice refused to change its holding.

Was this claimant not treated as a soldier from November 11, 1863, until November 29, 1864? He was enrolled for the Fifteenth New York Cavalry July 30, 1863. It does not appear from the official records and the evidence on file in the War Department that it was his fault that he was not accepted by the Government at this time. The Government did accept his offer of service November 11, 1863. He was then arrested as a deserter, but was relieved from this charge and ordered transferred to the invalid corps. Was this not treating the claimant as a soldier? If, after he was relieved from the charge of desertion, he was not regarded as a soldier, why was he not released? He was not undergoing sentence, neither was he held under any charges. What other answer can be given but that he was at this time treated as a soldier?

The reason he did not join the invalid corps does not appear. The claimant declares he remained at Fort Columbus, N. Y., until August 18, 1864. Whether this is the correct date or not, and there is nothing on file to disprove this, and the evidence tends to show it is true, it is of official record that some time in August, 1864, he was sent to the Fifteenth New York Cavalry. Can it be said he was sent to this regiment as a civilian? Was he not uniformed, armed, equipped, subsisted, and transported by the United States as a soldier? He has been paid as a soldier for more than a year. His name was taken up on the rolls of Troop G, Fifteenth New York Cavalry, and he was reported present for duty October 31, 1864. He has been given an honorable discharge as of date of November 29, 1864.

In the face of all this, notwithstanding the views set forth in the circular of the War Department dated June 18, 1903, that Department still holds that this claimant was not in the military service of the United States.

Section 4693, Revised Statutes, provides that any enlisted man, whether regularly mustered or not, who was disabled by any wound or injury received or disease contracted in the service of the United States and in line of duty, shall be entitled to a pension. It has been repeatedly held by this Department that muster in is not necessary to induct a soldier into the service of the United States, but that an offer of service, acceptance by the Government, and subsequent treatment as a soldier, are sufficient. There can be no doubt from the evidence that this claimant offered himself for military service. The Government accepted his offer November 11, 1863, and paid him as a private of Troop G, Fifteenth New York Cavalry from that date until November 29, 1864, as of which date he was given an honorable discharge by the War Department. In this connection, attention is invited to the cases of Graham Thorn (14 P. D., 249), Jefferson M. Human (12 P. D., 500), Margaret Griffin (11 P. D., 282), William N. Davis (7 P. D., 333), and Simon P. Chambers (6 P. D., 260).

The holding of the War Department that the claimant's husband was not regarded as having been in the military service of the United States was discussed in the case of Margaret Griffin, *supra*, as follows:

This decision of the War Department that the appellant's deceased husband was not in the military service of the United States is the basis of the action upon which her claims for widow's pension now stands rejected; but in view of the facts shown by the official record of the soldier's military service, and conceded by the War Department, this Department is unable to agree with or concur in said conclusion. It has uniformly been, and is now, the practice of this Department to accept the facts recited in the official records of the War Department relative to the military history and service of a soldier as binding and conclusive, nor will evidence be admitted in the prosecution of a pension claim to dispute or controvert the facts stated in said record, and any error therein must be corrected, if at all, by the authorities of the War Department; but the legal conclusions and deductions drawn by the officers of the War Department from such facts are not, and have never been, held to be conclusive and binding on this Department, although such conclusions are very strongly persuasive, and are, and should always be, entitled to the highest consideration and respect.

In the case of Human, *supra*, in discussing the date of entrance into the military service for pensionable purposes, the Department said that—

So far as discoverable after careful search it is believed that, for pensionable purposes, the commencement of service has been held to be that of date of enlistment, in general and ordinary cases, for the past twenty years. It is possible that the Department has, in some of its opinions, used language that might convey the contrary idea; but it is believed, after very careful investigation and mature deliberation, that such cases are rare and exceptional and against the settled opinion of this Department.

The War Department, from its standpoint, does not admit that a soldier is in the military service of the United States prior to the date of his muster in; and said conclusion may be correct from the point of view of the said Department. It is not for this Department to dispute it; but such view ought not to bind this Department

in the matter where a soldier claims pension, for the very cogent reason that a soldier's pensionable status is described by acts of Congress, the construction and application of which are vested by law only in the Secretary of the Interior. The status of a soldier as affecting questions in other departments is an entirely different matter from that of his pensionable status before the Department of the Interior; and the very law itself (section 4693, R. S.) forbids to this Department such a conclusion as is arrived at by the War Department from its standpoint. It ought not to need any extended discussion to demonstrate it to be not only the province, but the duty, of each executive department to, itself, interpret the laws governing its own administration, more especially when such laws are upon matters peculiarly in the province of each; and that the construction of the statutes by one department is not binding upon another department; a fortiori, when the law so construed has nothing whatever to do or in common with the question at issue and the principles involved before the other departments. (See opinions of Attorneys-General, 5 Op., 390; 7 Op., 700; 9 Op., 36; 11 Op., 470. See also 7 L. D., 700.)

Entry into, and honorable discharge from the military service having been disposed of, it now remains to be determined whether the claimant served ninety days or more in the military service of the United States during the late war of the rebellion, within the meaning of the act of June 27, 1890.

It has been repeatedly held that actual service is necessary to give title under this act. The question of the character of service required has been discussed by the Department in a number of cases, among which are Mary Dasher (14 P. D., 257), George Johnson (13 P. D., 46), William H. Veach (12 P. D., 273), John S. Robinson (11 P. D., 390), Margaret Griffin (11 P. D., 282), Nancy Rathton (9 P. D., 162), and George W. Fleck (7 P. D., 343).

The general presumption from payment for service is that actual service was rendered. It was held in the case of Mary Dasher, *supra*, that absence with leave is not incompatible with the rendition of actual service, there being nothing to show that the leave granted was for a purpose inconsistent with such service.

The evidence does not show that the claimant was not performing military service while at Fort Columbus, N. Y.; he was not reported absent on leave for pleasure or to transact private business; was not absent in desertion, nor undergoing sentence of a court-martial. In fact, there is no record nor evidence that he was not performing military duty. He was finally sent to his regiment; was taken up on the rolls, and reported present for duty.

The Department holds that this claimant has made due proof of such service as is required by section 2 of the act of June 27, 1890. His name was improperly dropped from the pension roll. The action of rejection is reversed, and the papers are returned with instruction to restore his name.

DIVISION OF PENSION—ACT MARCH 3, 1899—CRUELTY—DESEPTION.

DEMO *v.* DEMO.

The wife who, by her cruelty, drives her husband from home is herself the deserter. Cruelty was, at the common law, cause for a decree of separation.

Cruelty, as it relates to the marital status, is any conduct on the part of either of the married parties as endangers the life, body, or health of the other and renders cohabitation unsafe or intolerable.

False charges and a persistent course of jealous conduct on the part of the wife without cause, following her husband about, employing detectives to do so, and attempts to humiliate, exasperate, and insult him amount to such cruelty as would justify a separation without subjecting the husband to the charge of marital desertion within the meaning of the act of March 3, 1899.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, March 31, 1904.

Mrs. Mary C. Demo appealed February 15, 1904, from the Bureau action of January 7, 1904, wherein her claim, filed August 26, 1903, for one-half the pension of her husband, Marcellus Demo, a pensioner under certificate No. 36524, at \$46 per month, was rejected upon the ground that he was not legally chargeable with marital desertion, and that she was not in necessitous circumstances within the meaning of the act of March 3, 1899.

Claimant contends in her said appeal that the Bureau erred, as it was fully shown that pensioner was and is legally chargeable with marital desertion, and that she was in necessitous circumstances within meaning of the act referred to.

Pensioner, in answer to said appeal, contends, in brief, that he is not chargeable with marital desertion; that Anderson's Dictionary defines desertion by husband or wife as

an intentional and wrongful cessation of matrimonial cohabitation. An actual abandonment of matrimonial cohabitation, with intent to desert, willfully, maliciously persisted in, and without cause.

He further contends that in the State of Iowa, where they were married, and where the separation took place, in order to obtain a divorce on the ground of desertion it must be alleged and proved that the desertion was without reasonable cause. Citing *Pinkney v. Pinkney* (4 Green, 324). That for one to leave the other on account of such inhuman treatment as would entitle the party leaving to a divorce, is not such desertion as will entitle the other to a divorce; that "if the treatment by the defendant, considered as an entirety, is of a nature to affect the mind and undermine the health and thereby endanger the life of the plaintiff, it is sufficient to entitle the plaintiff to a divorce." Citing *Doolittle v. Doolittle* (78 Iowa, 691-694).

Pensioner further contends that under the act of March 3, 1899, he is not to be held to the strictness, upon mere separation, as if he were

applying for a divorce; that the marriage ties still exist, together with some of the responsibilities; that all the laws of inheritance are in force, together with other laws governing marriage relations; that said act was passed for the purpose of preventing a pensioner who had a wife dependent upon him for the necessities of life abandoning her in a helpless condition and leaving her a burden upon the community unless he had a reasonable cause for so doing.

He further contends as follows:

Whether from insane jealousy or from mistrust and hatred, true it is that the common courtesies shown by him to friends and neighbors were construed by her to be indications of illicit intercourse and a consort with harlots.

There is no evidence, so far as appellee has been able to discover, showing that his leaving her was through malice; and the true facts appear to be that he left her in sheer desperation on account of her cruel utterances against and treatment of him.

There is no evidence that she has sought to make amends and procure his return or a reconciliation, nor that she has any desire to do so.

She has obtained from him all his worldly goods and now seeks to have the Department secure her in one-half of his well-earned pension.

* * * * *

She has a home free and clear from all encumbrance and worth in the neighborhood of \$1,500, a good house, and nearly an acre of ground. She has a house and lot at Sheffield, Iowa, a small town about 15 miles distant from Mason City, in which last-named town she resides. She claims to have a mortgage of something like \$250 upon the Sheffield property, but there is nothing to prevent her selling her Mason City property and paying off the mortgage on the Sheffield property, putting the remainder out at interest, and living at Sheffield.

She is an able-bodied woman, in good health, a good dressmaker, capable of earning at least \$12 per week, and aside from this her son is at home and contributes to her support.

The appellant has no minor children and no one to support but herself, no children except the son hereto referred to, who not only supports himself but contributes to her.

Necessaries are defined to be such things as are necessary or required for the support and sustenance of human beings. It is true that the courts have held that these may depend largely upon the status of the family and habits of living; but what has been the former status of the parties hereto?

They have been farmers, and the appellant has always been in the habit of working, and has been in the habit of dressmaking—followed the trade—otherwise she would not be able to earn the money which she is shown to have earned.

The appellee has given her all his earthly belongings, and is now penniless, except or his pension. He is broken in health, unable to work but little; but still if he is able to accumulate anything the law still gives her the right to use his credit, and he is responsible for the ordinary family expenses which she may incur thereon.

She was not the wife of his youth, nor yet of his middle age; she was a widow when he married her, and was then earning her own living. They had been married about three years when he was compelled by her treatment of him to leave her and seek the comforts which he should have had at home in the household of strangers, an outcast at the age of 55, with no property and no money except as provided him by his country.

* * * * *

A court of equity would certainly grant him a separation, if not, indeed, an absolute divorce; and in view of the financial circumstances of the parties and their rela-

tive abilities to earn money, and the entire coterie of facts in this case, it would indeed be a hard law and an extremely inequitable equity, in the furtherance of the obvious unjust cause of the appellant herein, to grant to her one farthing of his pension.

The evidence in this case discloses the following facts: Claimant, a widow, at the age of 43 years was married, in 1898, at Sheffield, Iowa, to pensioner, a widower, then 50 years of age. They continued to reside and cohabit as husband and wife in said State of Iowa until about August 18, 1902, when pensioner left claimant and the matrimonial domicile and has not since resumed the matrimonial relation, although he appears to have, since their separation, contributed \$47 toward her support. Claimant was left in the possession of the homestead, which was purchased with their joint contributions, but conveyed to the claimant. Pensioner alleges that he paid \$900 toward the purchase of the property, and claimant admits that he contributed \$600 and afterwards built a barn on the property costing about \$125, and that she contributed \$500 of the purchase money. The homestead appears to be unincumbered. Claimant also owns another house and lot, which she values at \$400, encumbered with a \$200 mortgage. She has made some improvement on this property, and receives \$6 a month rent for the same. She is in good health, with no children except her adopted son, aged over 21 years, and earns, according to her own admission, about \$5 per month by her trade as dressmaker.

Pensioner's property is limited to his pension of \$46 per month for gunshot wound of left arm and resulting total disability of same. Aside from this disability his health appears to be impaired by disease.

The questions presented by claimant's appeal are, first: Marital desertion on the part of pensioner, and second: Her necessitous circumstances. The burden of proof is upon claimant to establish the affirmative of both said facts by satisfactory competent evidence, in order to entitle her to one-half her husband's pension under the first proviso of the act of March 3, 1899.

Considering first the question of desertion, it becomes imperative to ascertain which party is responsible for the separation. Claimant testified November 24, 1903, as follows:

I know we have not lived together or in the same house since his desertion, as stated in my application, and have not resumed marital relations. We have not lived together since the date of his desertion, August 18, 1902. I admit I have been jealous while my husband was living with me, but not without cause, for it was his habit, well and notoriously known, to take other women out riding with him and visiting with them frequently. When I spoke to him about this he admitted such to be the fact and that it was none of my business, and his conduct in that respect was common talk in the town and among our associates, and reported to me that women he went with were not of good moral reputation, and he well knew this, but seemed to wish to annoy me and cause me to be jealous of him; but I never paraded or published his conduct to my neighbors, except to one or two of my most intimate friends that spoke about his conduct, for it seemed so bad to have my home broken and my hus-

band's love and affection taken from me and our home life destroyed, and feeling as I did I believe any woman who loves her home, or wife who loves her husband would feel, after knowing the conduct of her husband was unnatural and cruel. It is perhaps true that I was jealous, but could not help or avoid it, but under all these conditions I was usually kind to him and attended to his every want and ever anticipating his comfort by making his home attractive, and did everything that a wife could do to hold the affection of her husband.

In support of claimant the following testimony is offered. William Nettleton testified as follows:

I was well and intimately acquainted with the above parties when married, and three or four months after their marriage said Marcellus Demo was taken sick—or about the last of August, 1898—and was sick from that to April, 1899; most of the time he needed some one to take care of him; and from the time he was taken sick in 1898 to March 1, 1899, with other friends, often visited him at his home on the farm; and when he moved to Mason City, Iowa, about March 1, 1899, he was at my house as a guest with his wife for about a week or two, and during all this time she waited on him as a good and faithful wife should.

And after they rented a house from Dan McGregor and went to living therein, I frequently, during his convalescence and afterwards, often visited him, and everything, so far as I could see, was done that could be for his comfort and happiness.

Maria Nettleton testified as follows:

She is well and intimately acquainted with Marcellus Demo, the soldier named, and also with his wife, Mary C. Demo, and lived four blocks from them from 1899 to the time Marcellus Demo left his home, in August, 1902, and was on intimate terms with them and visited each other frequently. That I have often heard Mary C. Demo mention the name of her husband, Marcellus Demo, and always in the most kindly manner, and never gave me any reason to believe that she was jealous of him or that she was of a jealous disposition, though it was common report among the neighbors that she really had cause to be jealous of her husband on account of his reported conduct with women of questionable character; that I never supposed she paid any special attention to his conduct away from the home or to ascertain the company he was with, for it was well known that he was not at home much of the time, daytime and early evening, and universally known that he took different women to ride with him and seemed to enjoy doing so, seemingly to cause his wife to be jealous of him.

That I do not believe she ever employed spies to trace him up, either by day or night, for such was in no sense necessary, for his conduct was open and notorious, and he did not seem to care to disguise his acts. I never have heard her traduce or villify the character of her husband, and never heard her call him a bad man and unfit for respectful people to associate with. I never heard her accuse him of immoral conduct, though that was his reputation in the community in which he lived; I was on such intimate and personal relations with Mary C. Demo and Marcellus Demo that I believe that if she had ever told her husband of his conduct or of what she had heard and knew of his conduct, she would have said something of the kind to me.

That I believe that she conducted herself kindly toward her husband and was faithful and kind to him at all times and in no sense guilty of nagging him or accusing him of bad conduct. I further state I do not know of any criminal conduct on the part of Marcellus Demo, but do know his reputation in the community was not good, for it was notoriously reported that he was frequently in company of women of questionable character and frequently took them out riding, disregarding seemingly the criticisms of the neighbors or the people in the community.

Three other witnesses testify, in a joint affidavit, to substantially the same as the last above-named affiant.

Frank Vernon testified:

I have lived in the family of the pensioner and his wife most of the time since their marriage to each other and know that he deserted her some time in the month of August, 1902; the cause of desertion I am unable to state, for they seemed to have lived happily together so far as I ever observed. The claimant always seemed to be very kind to him and I believe that he left her without any cause whatever; that she has always been a woman of good moral character.

The testimony on the part of pensioner and his witnesses bearing upon the question of claimant's alleged insane and ill-founded jealousy and conduct is, substantially, as follows:

Pensioner testified October 3, 1903, that his said wife became insanely jealous of him about three years ago, unjustly and without cause; that he had always conducted himself toward her as a true husband should. He further testified that—

He tried to live with her and make her life as happy as he could; that, on account of her insane jealousy, she has put spies on his track, employed detectives to follow him day and night, scandalized him in the presence of and to his neighbors, running his character down to them, telling them he was a bad man, unfit for decent people to associate with, and made all manner of remarks derogatory to his character and reputation.

That prior to their separation, which the affiant admits, the said Mary C. Demo, his wife, was continually nagging him at home, falsely accusing him of indecent and lewd immoral conduct, scolding him continually without any cause whatever, and making his life so miserable that he finally, and six months before their separation, told his said wife that she must stop such conduct toward him and that unless she did he must leave her.

That she continued this said treatment of him from that time on and until she drove him from his home and from her, the said Mary C. Demo. That it was impossible for this affiant to continue to live with the affiant (appellant) without becoming a nervous wreck on account of her aforesaid conduct.

That it was wholly on account of her said conduct that this affiant left the said Mary C. Demo.

That this affiant is wholly dependent upon his entire pension for his support and that it is the only means the affiant now has with which to support himself.

That he is now 55 years of age and broken in health and has in latter years been doctoring most of the time.

That his said wife, instead of being a deserted wife, is a triumphant one, having succeeded in getting all his property and driving him from her.

Mrs. Elizabeth Gasman testified September 28, 1903, as follows:

I am well acquainted with Marcellus Demo and Mary C. Demo, his wife.

I am a nurse and have been in their family at different times to nurse Mrs. Demo and both her son and his son.

I am familiar with his reputation and have always heard him mentioned as a man of good character and above reproach; knew him before he came to this city and he was then a man of influence and highly respected.

I am also well acquainted with his wife and know that she is of a very jealous disposition, as jealous of a 10-year-old girl as she is of an older woman, and at one time she retained me in her service at \$12 per week for a whole week after the doctor said

I was through, just because she did not want a hired girl to come into the house. She said she could not bear to have him speak kind to other women in her presence. She didn't claim to me that he was criminally intimate with them, but that she couldn't bear to have him speaking kindly to them.

I was present in their house shortly after Mr. Demo sold his farm. He was ill and unable to farm it any longer, and came to the conclusion he (had) better sell his farm and come to town. He wanted his wife to sign the deed to it and she refused to sign it unless he would give her \$900 out of the farm money. Shortly after he had given her this money she said to me, "things are coming my way and when I get things where I want them I'll make him dance to my music."

I was there at one time since they separated and she told me that he had been down to give her some money.

She is an able-bodied woman, and a first-class dressmaker; her son stays there with her and he contributes to her support; she told me that she got \$9 per month from her Sheffield property,

I know that Mr. Demo has paid doctor bills and nurse bills, and board for Mrs. Demo's son some of the time since he has been here. He has always been kind to his family.

She claimed to me that Mr. Demo had bought a bicycle for a certain woman in this town; that she had tracked him right to the door, and seen the wheel and took the number to look it up. It afterwards was proven and admitted by the husband of the woman that he had given Mr. Demo the money to buy this wheel and that Mr. Demo had simply acted for the man and not for the woman. She told me last winter that she would not live with Mr. Demo if he was made of pure gold; said she'd have nothing to do with him. She told me that she had some one watching him (this was shortly after he left her).

I have done everything I could to get them to live together, but she said she would not do it.

I have never heard him say anything disrespectful concerning Mrs. Demo.

Mrs. Emma Curtis testified as follows:

I am now and have been for the past three or four years acquainted with Mrs. Mary C. Demo, the wife of Marcellus Demo, of this city.

They lived in our neighborhood for two or more years prior to their separation.

She is a great gossip; she was always very jealous of him, and I have known of her following him around to see what he was doing; this at times when he would go up town on business.

She has told me about different women he has run with in Mason City, and she claimed to me that they were women of bad character; this before their separation.

She is a woman of very quarrelsome disposition and is always raising a disturbance in the community or district in which we reside (she resides and has for the past three or more years resided in our community or district).

I have heard them quarreling in the house when I went by. I have heard her scolding him out in the yard near our house.

I have known Mr. Demo for a number of years and he was always and is now generally reputed to be a man of first-class character and above reproach.

She has an adopted son, adopted by her before their marriage, living with her at this time. He is about 21 years of age and is contributing to her support.

She is an able-bodied woman, in good health, and is a dressmaker.

She is a great woman to be on the street, and seems to be constantly on the go when she is not working. She claimed to me she had property in Sheffield renting for \$8 per month.

Mr. Demo used to have quite sick spells, and when in such condition I have known her to go up town and leave him to take care of himself.

Mrs. F. McCormick testified to her acquaintance with both parties, claimant and pensioner, for the past four years, and further stated in affidavit as follows:

His general reputation in the community is good.

While they were living together and a short time after they moved into their residence there, she told me that Mr. Demo was a bad man; she said he was running after other women and claimed they were women of bad character.

She claimed that he was taking these women out riding; she even went so far as to claim that little girls whom he would take riding with him ought not to be allowed to ride with him, claiming that if their mothers knew him as well as she did they would not allow it.

She is a woman of jealous disposition. She has a young man, an adopted son of hers, named Frank Vernon, who lives with her at her home; he is a young able-bodied man and I think he works right along. Also claimed she got \$6 per month out of her Sheffield, Ohio, property.

She is a dressmaker by trade, an able-bodied woman, and claimed to have made \$30 per month dressmaking.

She is anything but peaceable in the community, and stirs up considerable strife in the neighborhood by telling neighbors what other neighbors have said, and this generally turns out to be false.

Mrs. J. W. Morgan testified to her acquaintance with claimant and pensioner for several years before they separated, and further stated as follows:

For about four years I have been acquainted with Mr. and Mrs. Marcellus Demo. I knew them several years before they separated, as I moved there the same fall they did.

I have been well acquainted with Mrs. Mary C. Demo, and can say that she is regarded in the community in which she lives as a scolding woman; she has found fault with her husband to me and has told me, before they separated, a considerable amount of stuff, claimed that he was a bad man; she claimed that he was running after women which she claimed had a bad character, and taking them into his buggy and taking them out riding. He had a horse and buggy of his own and was fond of riding out, and it was his habit to take into his buggy all manner of people—boys, girls, invalids, or whomsoever he thought might enjoy a ride. He took my little girl, 14 years old, out riding with him a number of times, and his wife, Mary C. Demo, would come over to our house and say I ought not to let my girl ride with him or I would be sorry sometime; but I have not been yet.

She commenced talking about her husband to me before she had got settled in their home and this was before they separated; she kept talking about him and berating and scandalizing him from that time on.

She is an able-bodied woman, a dressmaker, and she claimed to me one month that she had made \$30 dressmaking. I told her I didn't see how she could make so much, as she didn't stay at home long enough (she is a speedy sewer to my knowledge); she has a young man, her adopted son, stopping there, and she claims he helps her with his wages.

In our neighborhood she has been a mischief-maker, stirring up strife in the neighborhood.

Frank McCormick testified to his acquaintance with the parties for the last four years prior to 1903, and further as follows:

I know the general reputation of Mr. Demo, and it is first-class. He is reputed to be a man straight and square in every way; I am very well acquainted with him and

have been around where he was a good deal, and I have never heard or seen anything wrong with him.

Mrs. Demo I do not personally know much about, as I have heard so much about her that I have preferred to stay away from her.

She has the reputation in the community and town of being a very jealous disposition woman; she has the reputation also of going around among the neighbors and spreading lies of all kinds among them as to their neighbors.

Things went so far at one time that there were threats of having her arrested, but this finally died out. He left her because of her treatment of him in spreading these tales around about him and scolding him at different times, I am told. She has few friends in the neighborhood.

This comprises the testimony bearing upon the cause of separation. All of the affiants are reported as credible.

It is to be observed that while claimant admits that she was jealous, and charges her husband as being responsible therefor, neither she nor any of her witnesses have pointed out a specific case of immorality on his part, or indicated any individual with whom he associated who was immoral or an improper associate. Not a single act on the part of pensioner is shown which would justify claimant's conduct or jealousy. A false or unfounded charge by one of the married parties against the other has been held to amount to such cruelty as justified separation and even a decree of divorce. So, also, if claimant, by her cruelty, drives her husband from home she is, herself, the deserter. See *Hendershott v. Hendershott* (14 P. D., 130).

In the case of *Carpenter v. Carpenter* (30 Kans., 712), 46 Am. Rep. 108, the wife sent anonymous letters to her husband's clerk, falsely charging her husband with criminal intimacy with the clerk's wife, and sent similar letters to the newspapers. The court, under a statute granting a divorce for "extreme cruelty," held that the husband was entitled to a divorce.

The court by Valentine, J., in discussing that case, said:

The legal question that arises upon these facts is, whether they constitute "extreme cruelty," or not, within the meaning of the divorce statute. It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better-considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or the wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health or endanger the life of the other, or such as in any other manner endangers the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" under the statutes, although no physical or personal violence may be inflicted, or even threatened. (*Gibbs v. Gibbs* 18 Kans., 419; *Bennett v. Bennett*, 24 Mich., 482; *Goodman v. Goodman*, 26 id., 417; *Palmer v. Palmer*, 45 id., 151; *Whitmore v. Whitmore*, 49 id., 417; *Caruthers v. Caruthers*, 13 Iowa, 266; *Wheeler v. Wheeler*, 52 id., 511; *Powelson v. Powelson*, 22 Cal., 358, 361; *Smith v. Smith*, 8 Oreg., 100; *Kennedy v. Kennedy*, 73 N. Y., 369; *Latham v. Latham*, 30 Gratt, 307; *Black v. Black*, 30 N. J., Eq. 215, 221; *Cook v. Cook*,

3 Stock. (N. J.), 195; *Beyer v. Beyer*, 50 Wis., 254; *May v. May*, 62 Penn. St., 206; *Beebe v. Beebe*, 10 Iowa, 133.)

None of the foregoing cases are like the present case, but many of them sustain the principle above enunciated, and, taken together, they clearly show the tendency of modern thought upon this subject. The tendency of modern thought is to elevate the marriage relation and place it upon a higher plane, and to consider it a mental and spiritual relation as well as a physical relation. In the present case the conduct on the part of the defendant below was not only such as would tend to wound the feelings of the plaintiff below and to destroy his peace and happiness, and to impair his bodily health, but it was also such as would tend to put his life in danger.

In the divorce case of *Wheeler v. Wheeler* (53 Iowa, 511) the court had under consideration the wife's right to divorce by reason of such "inhuman treatment as endangers her life."

In discussing that case the court said:

The ill treatment contemplated by the statute is any course of "conduct that endangers, either apparently or in fact, the physical safety or health of the other, to a degree rendering it physically or mentally impracticable for the endangered party to discharge properly the duties imposed by the marriage." (1 Bish. Marr. and Div., pars. 717, 718.)

There may be legal cruelty without evidence of actual personal violence. If "austerity of temper, petulance of manner, rudeness of language, a want of civil attention, occasional sallies of passion do threaten bodily harm, they amount to legal cruelty." (*Beebe v. Beebe*, 10 Iowa, 133.) Any course of conduct, therefore, which would have the effect to impair health would be legal cruelty. Nor is it necessary that the parties should wait until bodily harm has taken place. If there is danger to be reasonably apprehended, it is sufficient. (*Caruthers v. Caruthers*, 13 Iowa, 266.)

As held in the case of *May v. May* (62 Pa. St., 206):

The indignities to the person need not be such as to endanger life or health, but such as would render life too humiliating to bear.

In the case of *Kelly v. Kelly* (18 Nev., 49), 51 Am. Rep., 732, it was held that "It is 'extreme cruelty,' warranting a divorce, for a wife to publicly accuse her husband of adultery." In discussing that case the court, by Belknap, J., said:

In considering extreme cruelty as a ground of divorce, courts have cautiously given it negative rather than affirmative definitions. The difficulty in giving an affirmative definition arises from the fact that cruelty is a relative term; its existence frequently depends upon the character and refinement of the parties, and the conclusion to be reached in each case must depend upon its own particular facts. "We do not divorce savages and barbarians because they are such to each other," said the supreme court of Pennsylvania, in *Richards v. Richards*. "We can exercise no sound judgment in such cases (divorce cases) without studying the acts complained of in connection with the character of the parties, and for this we want the common sense of the jury rather than fixed legal rules." (37 Penn. St., 228.)

We scarcely need the aid of judicial authority for the enforcement of the truth that there may be cruelty without personal violence, and that such cruelty, working upon the mind, may affect the health. Wretchedness of mind can hardly fail to have this result. In causes of divorce upon the ground of cruelty, wives appear as complainants more frequently than husbands. This arises from the fact that the husband is generally physically stronger than the wife, and less susceptible to the effects of ill treatment than she. He, too, may, in fact, frequently restrain the wife's violence,

by the exercise of marital power in the domestic forum, without the aid of courts. But the law does not encourage him to measure strength with her. "The fact that the husband can defend himself is the very grievance. It is because he may be tempted, in defending himself, to retaliate upon his wife, that the court is bound to interfere, and to decree a judicial separation when such acts are proved. When a man marries an ill-tempered woman he must put up with her ill humor; but the moment she lifts her hand against him the court must interfere, for if it does not, how can it answer the husband if he should subsequently allege that he had been forced to use violence in self-defense?" (*Forth v. Forth*, 36 L. J., 122, cited in *Browning Marr. and Div.*, 111. See also *Turner v. Turner*, decided by the Iowa supreme court January 13, 1904, and reported in 97 N. W. Rep., 997.)

It appears from the evidence in the case under consideration that claimant preferred false charges against her husband and indulged in a persistent course of jealous conduct without cause; that she followed him about, employed detectives to do so, and sought to humiliate, exasperate, and insult him, and the Department is of the opinion that such conduct on her part amounted, in this case, to such cruelty as justified a separation without subjecting her husband to the charge of desertion within the meaning of the act of March 3, 1899.

Such conduct would naturally tend to terminate all conjugal relations and result in marital separation. The further fact that claimant has not sought to effect a reconciliation, but has rejected the efforts of others to accomplish that result, tends to show that the separation was not against her wishes or consent, while pensioner's contribution toward the support of his wife since the separation tends to disprove an intent on his part to desert her.

As stated in the case of *Martin v. Martin* (13 P. D., 430):

Desertion begins with the intent to desert. One can not be deserted while he or she consents to the separation, or if either, by unjustifiable conduct, has caused the separation. The one who intentionally drives the other away is the deserter. The times begins to run when the intent to desert is formed, but does not run during complainant's consent to separation. Citing *Stewart on Marriage and Divorce*, pars. 251 and 252; *Rothery v. Rothery* (11 P. D., 77); *Harris v. Harris* (12 P. D., 7); *Coats v. Coats* (12 P. D., 507); *Smith v. Smith* (13 P. D., 177); *Whitney v. Whitney* (13 P. D., 301).

Cruelty was, at the common law, cause for a decree of separation. (9 Am. and Eng. Ency., 2d ed., p. 783.)

Cruelty, as it relates to the marital status, is any conduct on the part of either of the married parties as endangers the life, body, or health of the other, and renders cohabitation unsafe or intolerable.

A less degree of cruelty would justify a separation than would justify a divorce under a statute authorizing a divorce on the ground of "extreme cruelty."

So, also, mere separation does not constitute desertion, but the separation must be against the will and consent of the innocent party. Separation alone is not even *prima facie* evidence of desertion. *Rothery v. Rothery* (11 P. D., 77-82 and 83).

Applying the foregoing well-recognized rules of law and evidence to the facts as disclosed by the testimony in this case it is evident that claimant has failed to establish marital desertion on the part of her husband.

Considering now the question as to claimant's alleged "necessitous circumstances," the Department is of the opinion that, in view of the character and amount of property owned and controlled by claimant, her age, health, and earning ability, as compared with that of her husband, it can not truthfully be said that she is in "necessitous circumstances" within the meaning of that term as construed in the case of *Hunter v. Hunter* (14 P. D., 136) and authorities therein cited.

The Department is, therefore, of the opinion that the Bureau was fully justified in its action in this case, and the same is accordingly affirmed.

DIVISION OF PENSION—ACT OF MARCH 3, 1899—DESERTION.

BYRNS *v.* BYRNS.

Pensioner's contention that he did not desert claimant is not sustained by the evidence in this case.

A wife deserted by her husband is, under the laws of California, entitled to her own domicile. *Moffatt v. Moffatt* (5 Cal., 281); *Hardenberger v. Hardenberger* (14 Cal., 654).

Assistant Secretary M. W. Miller to the Commissioner of Pensions.
March 31, 1904.

Joel Byrns, a pensioner under certificate No. 956857, appealed February 23, 1904, from the Bureau action of January 23, 1904, wherein the claim of his wife, Jennie E., filed July 27, 1903, for one-half his pension, was allowed on the grounds that he had deserted her, she being of good character and in necessitous circumstances.

Pensioner bases his appeal upon the ground that he did not desert claimant, but that he has, to the best of his ability, provided for her both support and domicile.

The evidence in this case shows that the parties were married in 1898 and separated about September, 1902. At the time of their separation they were residing in Monterey, Cal., in their own home. Pensioner contended before the Bureau that he had offered claimant a home near the Soldiers' Home in Los Angeles County, Cal., and had offered to pay her expenses there and support her to the best of his ability, but that she had refused his offer and insisted upon remaining at Monterey. This offer on the part of pensioner does not appear to have been made until after she had filed her application in this case for one-half his pension, and is contained in a letter by him

to claimant dated October 21, 1903, a copy of which was filed by pensioner and is as follows:

Mrs. JENNIE E. BYRNS: I am here at the Soldiers' Home. I am not admitted yet, but may be soon. I have just been down to the town of Sawtelle, which adjoins the Home grounds. It is only about 80 rods from the Home buildings. I can get two front rooms with the use of a washhouse, tubs, etc., water included, for \$4 per month, or a cottage of two rooms, with water, for \$5 a month. I can get work here so I can make \$10 or \$12 a month besides my pension, and if you will come down here and live as my wife I will do the best I can to support you. I can live at the Home, board and lodge here, so that will cost nothing. You can make as much here as anywhere at sewing or other work, and if you will release my pension money I will pay your expenses down here, and all I will ask of you is that you shall live within our means; that is, not go in debt. Now, answer this as soon as possible so I may know what to do. If you do not answer this in twelve days I shall take it to mean that you refuse to come and govern myself accordingly.

Yours, truly,

JOEL BYRNS,

Soldiers' Home, Los Angeles County, Cal.

To this letter claimant responded as follows:

NEW MONTEREY, October 27, 1903.

Mr. JOEL BYRNS: Your letter received to-day and I will hasten to answer. After being gone from home one year and never writing to me, and not knowing where you were all that time, you ask me to come to you. You ought to be at home to ask me to come back to you after going away as you did when I was out at a neighbor's, came home and found you was gone, took all the money and sold your mining stocks and did not tell me and left without a cent and half sick from hard work, and in debt, as you know you had to pay debts to some one at the Home out of the first money you drew and, of course, I had to get in debt, not very much, either. Instead of staying at home and helping me pay it, took all the money and left me without one word, and then you think I will come to you. No; you have left me too often the same way. I have worked hard to pay that bill and live the same time. I am not well at all and Monterey is good enough for me. Here I have some friends. After you are at that Home a while you will get tired and want a change and go some other place; but I shall stay at Monterey. I got home for you four times, and you think more of some other home than mine, so you will have to stay there. You had no reason to leave my home, and everybody in Monterey thought you must be crazy to do as you have done; but I will get along, I guess. Everybody here is good to me, and when I am sick come and take care of me. * * * I guess this is all. Good-by.

JENNIE E. BYRNS.

The evidence in this case clearly establishes the fact that pensioner left claimant and the matrimonial home and has failed to contribute to her support for nearly a year prior to her application in this case. It further appears that claimant is an honest, industrious, hard-working woman, and that she gave her husband no just cause for separation. He appears to have been the party at fault. The only question, therefore, remaining to be determined is whether or not claimant, by refusing to accept her husband's offer, contained in his said letter, has violated her legal duty as his wife, and has herself become the deserter.

While the general rule is that the domicile of the husband is the domicile of the wife, and that he has the right to establish his domicile

when and where he pleases, and that the wife must follow him, his own conduct being upright and honorable, under penalty of being considered the deserter in case she refuses, yet this rule only applies when the husband is acting within the scope of his legal authority, and not in violation of the rights or necessities of the wife or family. To bring himself within the rule, he must exercise his authority with reason, discretion, and honest intent, to perpetuate or prolong, but not to terminate or destroy, the marriage relation or the home.

In the case of *Pierce v. Pierce* (12 P. D., 412) the husband deserted his wife in the State of Michigan, and while living in California sought to defeat her claim for one-half his pension on the ground that he had offered her a home in Los Angeles, Cal., where he was then residing, and her failure to then accept his offer, contending that she thereby became the deserter; that he had the lawful right to fix the domicile, and the wife's duty was to follow her husband. In passing upon that appeal it was stated that—

While the law recognizes the right of the husband to fix the domicile and requires the wife to follow the husband, under penalty of being considered the deserter, yet he can not exercise this power arbitrarily, but with reason and discretion. He is, therefore, required to show reasonable cause why his wife should follow him when he changes his abode. The refusal of the wife to follow her husband, who has deserted her, to another State, and leave her home upon the mere offer of her husband to provide a home for her, does not necessarily constitute her the deserter. Citing *Schouler on Domestic Relations* (3d ed.), par. 38, and other authorities.

In the case of *Moffatt v. Moffatt* (5 Cal., 281) the court held that the desertion of the husband entitled the wife to her own domicile.

So, also, in the case of *Hardenberger v. Hardenberger* (14 Cal., 654) it was held that the failure of the wife to leave their home in New Jersey and join her husband in California did not constitute her the deserter.

In *Anderson v. Watt* (138 U. S., 706) the Supreme Court, by Fuller, C. J., concisely stated the law upon this subject as follows:

The place where a person lives is taken to be his domicile until facts adduced established the contrary, and a domicile, when acquired, is presumed to continue until it is shown to have been changed. *Mitchell v. U. S.* (21 Wall., 350-352); *Desmare v. U. S.* (93 U. S., 605-609); *Shelton v. Tiffin* (6 How., 163); *Ennis v. Smith* (14 How., 400). And although the wife may be residing at another place, the domicile of the husband is her domicile. Even where a wife is living apart from her husband, without sufficient cause, his domicile is, in law, her domicile. *Cheely v. Clayton* (110 U. S., 701-705).

The rule is, said Chief Justice Shaw, in *Harteau v. Harteau* (14 Pick., 181-185), founded upon the theoretic identity of person, and of interest, between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote strength, and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests.

In *Cheever v. Wilson* (76 U. S., 123) it was said:

It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she can not have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise and endures so long as the necessity continues.

In *Mitchell v. United States* (88 U. S., 352) the court said:

A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time has been defined as domicile. This definition is approved by Phillmore in his work on that subject. By the term domicile, in its ordinary acceptation, is meant the place where a person lives and has his home. The place where a person lives is taken to be his domicile until facts adduced establish the contrary. A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests upon the person who makes the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change can not be made except *facto et animo*. Both are alike necessary. Neither without the other is sufficient. Mere absence from a fixed home, however long continued, can not work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired the old one remains. These principles are axiomatic in the law upon the subject.

In the recent case of *Kendall v. Kendall* (14 P. D., 159) the question of the wife's right to her separate domicile under the laws of Pennsylvania was involved, and the statute and the decisions of that State were cited showing her right thereto when deserted by her husband. It was accordingly held in that case that pensioner having deserted his wife his legal duty was to rejoin her at her home, and that he could not, by offering her a home elsewhere, which he did not possess, constitute her the deserter merely because of her refusal to follow him, the cause of the separation having been such as would have entitled her to a divorce under the laws of Pennsylvania. That the wife having been deserted by the husband was entitled to her own domicile.

In the case under consideration while claimant would be fully justified in acquiring and maintaining her separate domicile by reason of her husband's desertion, yet the evidence tends to show that her domicile in this case is the domicile of the husband also. His temporary residence at a Soldiers' Home, without any evidence of his intention to permanently remain there, would not indicate such a change of domicile as would justify the wife in following him in view of all the facts and circumstances in this case. It is to be noted that in his letter to her he merely proposed to rent rooms or a house; he had no home to offer her, and even this offer appears to have been merely a proposition on his part which he submitted to her discretion. His offer to pay her expenses from Monterey to the Soldiers' Home was conditioned upon the release of his pension money, which was being suspended by the Bureau pending the adjudication of her claim. Even his conditional

offer does not appear to have been made in good faith with any desire or intention of reestablishing the matrimonial home, but indicates rather a desire upon his part to defeat his wife's claim, besides adding to her annoyance and inconvenience.

Pensioner having deserted his wife, his marital duty is, as substantially stated by claimant in her letter to him to return to her home, and he can not, by offering her a home elsewhere which he did not possess, constitute her the deserter merely because she refused to follow him and surrender the home she already had.

The Bureau action appealed from appears to have been justified by the evidence in the case and the law applicable thereto. Said action is accordingly affirmed.

SERVICE INDIAN WARS—ACT JULY 27, 1892—EVIDENCE.

MARGARET A. DAVIS (WIDOW).

The evidence showing that soldier was paid for one month and twenty-nine days' service, including twenty-nine days' travel pay, he is held to have been in the service of the United States for thirty days within the meaning of the act of July 27, 1892.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 31, 1904.*

James M. Davis, late of Capt. H. W. Cooke's company, Third Battalion Tennessee Infantry, Cherokee disturbances, filed a claim for pension under the act of June 27, 1892, September 14, 1892, alleging, among other things, that he enlisted for a term of three months, at Calhoun, Tenn., on or about March 20, 1838, and was honorably discharged at Ross Landing, Tenn., on or about June 26, 1838.

The claim was adjudicated November 1, 1893, when pension was allowed at \$8 a month, beginning July 27, 1892, which was received by the pensioner continuously up to and including February 3, 1900. The soldier died March 28, 1900.

His widow, Margaret A. Davis, filed a claim for pension August 17, 1900, alleging that she was joined in marriage to James M. Davis at Rolla, Mo., July 27, 1865, and that her said husband died at Mount Grove, Mo., March 28, 1900.

This claim was adjudicated May 10, 1901, when the following official action was recorded:

Approved for rejection—no title—soldier did not serve thirty days as required to entitle to pension.

Following said action, the claim was stamped "Rejected" July 30, 1901.

Her claim for accrued pension was rejected on the 26th of July, 1901, on the ground that soldier did not render thirty days' actual service as required by act of July 27, 1902.

The latter claim was stamped "Rejected" July 30, 1901.

An appeal from both actions was filed September 22, 1902, wherein it is contended that the testimony of two comrades, on file in the case, shows that the soldier was in active service in said company more than thirty days, the necessary requirement of the act, and if additional testimony be required she can furnish it to the satisfaction of the Commissioner, to the end that both claims will be allowed. Appellant also affirmed that there were two soldiers in the same company named James Davis, and possibly the names and service may be confused.

A report from the War Department, October 14, 1893, shows that James M. Davis, Capt. H. W. Cooke's company, Third Battalion Tennessee Infantry, Cherokee war, was enrolled May 29, 1838, and mustered in June 1, 1838, at Calhoun, Tenn., and mustered out with company June 24, 1838, at Ross Landing.

A second report, May 31, 1901, follows:

Respectfully returned to the Commissioner of Pensions, with the information that in the case of James M. Davis, private, Captain Cooke's company, Third Battalion Tennessee Infantry, mustered out with company June 24, 1838, at Ross Landing.

[Date and place of disbandment of above organization not shown.]

A report from the Treasury Department, Second Auditor's Office, under date of October 5, 1893, follows:

Respectfully returned to the honorable Commissioner of Pensions.

The muster roll of Capt. Hiram W. Cooke's company, Tennessee Volunteers, reports James M. Davis enrolled May 29, 1838, at Fort Cass, and discharged June 24, 1838, at Ross Landing, Tenn.

He was paid from May 29, 1838, to June 24, 1838, one month and twenty-five days, including twenty-nine days' travel—280 miles to place of rendezvous and 300 miles from place of discharge home.

The company was ordered into the service by Maj. Gen. W. Scott.

The roll does not show whether the company was or was not at the seat of war for thirty days.

The Bureau issued three subsequent calls on the Auditor for the War Department, requesting that the date of disbandment of Capt. H. W. Cooke's Third Battalion, Tennessee Infantry, be furnished, but the said Auditor was unable to furnish the required information.

William G. Horton, a comrade, messmate, and bunk mate, stated under oath, December 4, 1900, that the soldier and he enlisted in April, 1838, and were discharged in July, 1838.

According to a statement on the brief face of soldier's claim for pension, a bounty-land warrant was issued under act of 1855, No. 82592, for 120 acres of land.

The foregoing is the evidence before the Bureau when the several claims were rejected.

Section 1, act of July 27, 1892, provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll the names of the surviving officers and enlisted men, including marines, militia, and volunteers of the Military and Naval service of the United States, who served for thirty days in the Black Hawk War, the Creek War, the Cherokee disturbances or the Florida War with the Seminole Indians, embracing a period from eighteen hundred and thirty-two to eighteen hundred and forty-two inclusive, and were honorably discharged, and such other officers, soldiers and sailors as may have been personally named in any resolution of Congress, for any specific service in said Indian Wars, although their term of service may have been less than thirty days, and the surviving widows of such officers and enlisted men: *Provided*: That such widows have not remarried: *Provided further*, That this act shall not apply to any person not a citizen of the United States.

Also section 5 of same act:

That the pension laws now in force, which are not inconsistent or in conflict with this act, are hereby made a part of this act, so far as they may be applicable thereto.

Section 4701 of the Revised Statutes provided as follows:

The period of service of all persons entitled to the benefits of the pension laws, or on account of whose death any person may become entitled to a pension, shall be construed to extend to the time of disbanding the organization to which such persons belonged, or until their actual discharge for other cause than the expiration of the service of such organization.

In the case of David J. Bailey (7 P. D., 173) this Department held that—

Under the provisions of the act of July 27, 1892, period of service commences from the date when a claimant appeared at the place of battalion, regimental, or brigade rendezvous designated in proper orders, and ends at the date when he reached said rendezvous on his return, or (section 4701, R. S.) the date of individual discharge or the date when the organization to which he belonged was disbanded. *Houston v. Moore*, 5 Wheaton (4th U. S. R., 535).

In this case the records fail to show the rendezvous or where the battalion was disbanded.

In the case of Margaret M. Swann (8 P. D., 149) the facts were summarized as follows:

Soldier was granted bounty land in 1851 on the ground that he had "actually served one month" and was also allowed pension under the act of July 27, 1892, on the ground that he served thirty days in the Creek Indian war. The record shows that he was enlisted and mustered in at Columbus, Ga., June 9, 1836, and mustered out with the company at the same place, July 7, 1836, and was allowed twelve days' travel pay, six from his home to place of rendezvous and six from place of rendezvous to his home. His widow's claim was rejected on the ground of insufficient service.

Held:

1. That under section 4701, Revised Statutes, the soldier's service for pensionable purposes did not necessarily end at date of muster out, but continued until the disbandment of the organization.

2. That the soldier's right to pension having been conceded, and no question in regard thereto having been raised during his lifetime, the burden of proof is on the Government, when it sets up the plea of insufficient service against the widow's claim.

3. That it has not been proved that soldier did not serve thirty days.

The facts stated in the foregoing epitome of the evidence are almost identical with the history of this case, except that the bounty-land

warrant in the Swann case was granted under the provisions of the act of September 28, 1850, wherein the soldier's title to 40 acres of bounty land depended upon his actual service of one month, whereas under the act of March 3, 1855, the soldier was required only to prove a service of not less than fourteen days. However, the act of March 3, 1855, increased the acreage of bounty land in all cases therein named, where the soldier's service was fourteen days or more, to 160 acres and further provided that "where any person so entitled has, prior to the third day of March, eighteen hundred and fifty-five, received a warrant for any number of acres less than one hundred and sixty, he shall be allowed a warrant for such quantity of land only as will make, in the whole, with what he may have received prior to that date, one hundred and sixty acres." Hence, from the fact that the soldier received 120 acres under the act of 1855, as stated on the brief face, it is a fair inference that 40 acres, the balance of the 160 acres due him under the act of 1855, was received under the act of 1850.

In this case, as well as the one above referred to, the place of rendezvous has not been shown by record evidence or the testimony of witnesses, and it does not appear that the claimant was ever called upon to furnish such evidence, even if it were possible to obtain it after a lapse of about sixty-six years, and as the soldier is now dead, and his widow old and infirm, it is believed to be both unwise and unnecessary to open up the case for the purpose of investigation on that line.

Therefore, under the rule prescribed in the Swann case, the several actions of the Bureau covered by the appeal are reversed.

In relation to the accrued pension due the soldier at his death, it is manifest that payment thereof can not be withheld or suspended by the Commissioner of Pensions, under the act of December 21, 1893, until after due notice and hearing of all the evidence, he may decide to annul, vacate, modify, and set aside the decision upon which such pension was granted, provided the widow claimant has established her widowhood.

Rejections reversed.

RESTORATION—ACT MARCH 3, 1901. DIVORCE—EVIDENCE.

ELIZABETH VALLEAN, NOW GOSHORN (WIDOW).

The evidence shows that claimant secured a divorce from her second husband on her crossbill by a verdict of a jury and was awarded alimony. She therefore is entitled to restoration under the act of March 3, 1901, as it must be presumed the divorce was granted without fault on her part.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 31, 1904.*

Andrew J. Vallean served as a private in Company A, Third Michigan Volunteer Cavalry, from the date of his enlistment, August 23, 1862, until his death in the service, June 7, 1863.

His widow, Elizabeth Vallean, to whom he was married December 31, 1846, was pensioned as such, certificate No. 36032, until her remarriage to one Hugh A. Goshorn, September 8, 1864, when her pension ceased by reason of such remarriage.

November 14, 1868, she was divorced from the said Goshorn by decree of the Jay County, Ind., court of common pleas.

April 25, 1901, she filed an application for a pension as the widow of Vallean, under the act of March 3, 1901.

Said claim was rejected finally July 3, 1902, on the following stated ground:

That while claimant did obtain a divorce from her last husband, Goshorn, upon her own application, it is shown upon special examination that the causes or facts upon which such divorce was granted were not without fault on her part, as required by the act.

She appealed from that action August 13, 1902, contending it was contrary to the law and facts in the case.

It appears from a duly authenticated copy of the proceedings in the court of common pleas of Jay County, Ind., that the husband of this claimant filed a complaint for divorce against her, she at the time being a resident of the State of Michigan, May 12, 1868, in which he charged her with being guilty of adultery with one Greenwood.

Thereafter, defendant appeared by counsel and answered said complaint, first by general denial, second by filing a cross complaint for divorce, in which she charged her husband, plaintiff, with cruel treatment and abandonment.

Witnesses were subpoenaed, depositions taken and filed, the issues properly joined, and the facts tried by a duly and legally impaneled jury.

Said jury having heard the evidence, arguments of counsel, and instructions from the court, returned into court the following properly signed verdict:

On the cross complaint we the jury find for the plaintiff.

Pursuant to such finding, the court granted this claimant an absolute divorce from her husband, Hugh A. Goshorn, together with a judgment for \$200 alimony and costs, which were subsequently paid by him.

It legally and logically follows that, if claimant had been in fault, the court of common pleas of Jay County, Ind., could not and would not have decreed her a divorce. The very fact that the divorce was granted claimant on her cross complaint, after a trial, is sufficient evidence that she was without fault.

It is and has been the law in Indiana that, where both husband and wife are affirmatively applying for divorce, the courts trying the issue must decide which party is entitled to a decree, and so find if either is shown to be entitled to a decree, and if both are in fault no decree is granted.

In the case of *Alexander v. Alexander* (140 Ind., 155), the court held that:

On the trial of an action for divorce, the court can only grant a divorce to the party who is found to be the injured party, and, where both parties seek a divorce upon affirmative allegations, the court must find which of the parties is entitled and enter a decree accordingly.

There was some evidence adduced on special examination, notably that of one witness, a Mrs. Southard, to the effect that claimant had committed adultery with one Greenwood, and it is further shown that the charges of infidelity against claimant, by Goshorn, were based upon rumors circulated by the Southard woman.

It appears that he, after hearing such rumors and charging his wife with infidelity and threatening her with divorce proceedings on such grounds, he forgave and condoned the offense by again living and cohabiting with her.

Granted that she was guilty, as charged by him, he was, after condoning the offense, forever debarred from setting up the same as a cause for divorce or justification on his part for abandoning his wife.

From all the evidence the Department disbelieves the truthfulness of the charges of adultery made by Goshorn against claimant.

In the case of *Shores v. Shores* (23 Ind., 546), the court held that:

A wife is justified in leaving her husband when he treats her in a cruel manner.

In the case of *Groft v. Groft* (76 Ind., 136) the court held that:

False charges of unchastity by a husband against a wife will constitute cruel treatment.

It appears, therefore, that claimant secured a divorce from her husband, under circumstances in a most peculiar manner, favorable to her, and that their separation and such divorce was without fault on her part.

If the action appealed from was upheld, it would not only nullify a decree of court, but set aside a jury verdict as well, all of which the Department does not feel justified in doing.

The action appealed from is therefore reversed and the papers returned herewith for readjudication in accordance with this decision.

SERVICE—DISCHARGE—ACT JUNE 27, 1890—DISCHARGE WITHOUT HONOR.

PETER ANDREWS.

The claimant having been discharged while in confinement at hard labor, under sentence of a court-martial, it is held that his discharge was not honorable, but "without honor," and that he has not a pensionable status under the act of June 27, 1890.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 31, 1904.*

Peter Andrews, formerly a soldier in Company E, Ninety-sixth Regiment United States Colored Infantry, filed on August 22, 1892, a claim for pension under the act of June 27, 1890, alleging that he enlisted in the above-named organization on April 12, 1865, and was honorably discharged February 1, 1867, and that he was unable to earn a support by manual labor by reason of piles, varicocele and hydrocele, and injury of the left thigh. Said claim was rejected in December, 1896, on the ground that his discharge from the service was not considered by the War Department as honorable. From that action an appeal was taken October 30, 1902, the contention being that the claimant's discharge was in form and in fact honorable; that the War Department was without authority to change it to a dishonorable one, and that the Department of the Interior is under no obligation to follow the mere opinion of the War Department as to the character of the discharge.

The facts are that the soldier enlisted April 18, 1865, and served until some time in November or December, 1865 (according to his statement), when he was placed under arrest, charged with "sleeping on post." He was tried by a general court-martial on this charge and found guilty and sentenced to be confined at hard labor for the period of eighteen months and to forfeit \$10 per month for the same period. The muster-out roll of his company dated January 29, 1866, shows him—

"serving sentence at Fort Jefferson, Fla., for eighteen months and forfeit \$10 per month of his monthly pay during said period by sentence of G. C. M. No discharge furnished."

A report from the War Department furnished October 10, 1896, states:

It has this day (October 9, 1896) been determined by this Department, from records on file, that this man was discharged January 29, 1866, by reason of the muster out of his company while he was in confinement at Fort Jefferson, Dry Tortugas, undergoing the sentence of the court.

The claimant has filed his certificate of discharge, which reads as follows:

TO WHOM IT MAY CONCERN.

Know ye that Peter Andrews, a private of Captain David R. Hawkes's Company E, 96th Regiment of United States Colored Infantry Volunteers, who was enrolled on the eighteenth day of April, one thousand eight hundred and sixty-five, to serve three years, or during the war, is hereby discharged from the service of the United States, the twenty-ninth day of January, 1866, at New Orleans, Louisiana, by reason of discharge of his regiment. (No objection to his being reenlisted is known to exist.) Said Peter Andrews was born in 21 Mile Bluff, in the State of Alabama, is 22 years of age, five feet seven inches high, black complexion, black eyes, black hair, and by occupation when enrolled a laborer.

Given at New Orleans, La., this second day of February, 1867.

(Signed)

A. McALLISTER,

Capt. 10th U. S. Carl., Bvt. Lt. Col. U. S. V., C. M. D. G.

This was evidently a discharge given February 2, 1867, to date as of January 29, 1866, the date of the muster out of the regiment. It is the usual form of discharge and does not contain either the word "honorable" or "dishonorable." It was not a "dishonorable discharge," technically speaking, since a dishonorable discharge can be given only by a sentence of court-martial, and the court in this case did not sentence the claimant to be dishonorably discharged. The War Department, however, recognizes three kinds of discharge, viz:

"The honorable, the dishonorable, and the discharge without honor;"

and this Department has adopted and followed the rule of the War Department on that subject. (See the case of George W. Fleck, 7 P. D., 343.) Among the discharges that are held to be "without honor" is the one given "when, at the time of the soldier's discharge, at or after the expiration of his term of enlistment, he is in confinement under the sentence of a general court-martial, which does not provide for a dishonorable discharge." (Circular No. 9, 1893, Headquarters of the Army.) Such was the discharge in this case. The form or wording of the certificate is immaterial, the character of the discharge being determined by the circumstances under which it was given.

For reasons above stated it is held that this claimant was not honorably discharged from the military service of the United States, and consequently has no title to pension under the provisions of the act of June 27, 1890. The action of the Bureau is affirmed.

BOUNTY LAND—SUCCESSION—TITLE—PRACTICE.

EMIE SULLIVAN (ADMINISTRATRIX).

Both the soldier and those named in the bounty-land law as successively entitled to receive a warrant on account of his service having died without claiming such warrant, the title thereto has lapsed.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 31, 1904.*

This appellant, Emie Sullivan, on March 23, 1903, filed this claim, No. 338,589, for a bounty-land warrant as administratrix of the estate of James B. Sullivan, who was an assistant surgeon in the United States Army from May 5, 1829, to December 31, 1835, when he resigned, and who died in 1886.

Said claim was rejected May 28, 1903, on the ground that the claimant, as such administratrix, has no title under existing laws, no claim having been filed by the decedent, nor as his niece, as there is no law granting bounty land to nieces.

In this appeal, filed September 15, 1903, it is contended that said decedent died vested, under the act of February 11, 1847, and section 5597 of the Revised Statutes, of a right to bounty land, which

descended, as part of his estate, to the claimant either as his administratrix or as his niece, and that a warrant should issue to her either in one or the other capacity or for the use and benefit of the soldier's brothers and sisters.

The contentions in this case are certainly peculiar. The claimant, or her attorney, seems to have no certain idea of her own position under the law, but aims evidently to secure whatever, if anything, may be coming in the way of bounty-land warrant on account of the decedent's military service, whether she is entitled to it merely as administratrix of his estate or merely as a niece or merely as, apparently, a volunteer trustee for his brothers and sister, none of whom, however, survived him and who are only represented herein, as she says in her claim, by their several children.

In this claim she says merely that "she makes this application as the administratrix of the estate" of said deceased soldier. The latter died leaving, it appears, a will, which named as executor a brother, John H. Sullivan, who died, however, without executing said will: and no attempt to execute the same appears to have been made until April 29, 1902, when it was proved before the district judge of the parish of Rapides, Louisiana, where the soldier died, as a nuncupative will, the original being lost or destroyed, and appellant was appointed by said judge dative testamentary executrix thereof, as shown by certified record of the proceedings.

The deceased directed in this will that his executor should prosecute, compromise, or adjust any and all claims he might have against or which might be found due him from the United States Government; and it is under this provision of said will and said laws above referred to that the appellant contends she, as such administratrix, is entitled to file and prosecute this claim and receive bounty-land warrant thereunder.

Such contention is wholly untenable and can not be sustained. The title to bounty land vests in a soldier in only a limited and qualified manner; and its investment and descent is determined solely by the Federal statutes.

This soldier having died without claiming bounty land, title to such on account of his service passed on his death to those only whom the law names as entitled upon the failure of a soldier to receive bounty land. These are either a widow, children, father, mother, brother, or sister (sec. 2418, Revised Statutes), none of whom in this case, it appears, is now living, and none of whom who may have survived the soldier filed any claim for bounty land. The title therefore to bounty land on account of his service has lapsed under the law, as there is none to whom the law gives it on the failure of these to receive it. The line of succession fixed by the statutes has ended, and the title no longer exists in anyone.

A bounty-land warrant is a personal gratuity, title to which vests only as the statutes specifically provide, and in those only in whom the statutes specifically vest it. Being a personal gratuity, the title thereto does not so vest in any person named in the statute as to pass to such person's heirs and legal representatives as part of his estate in law, but descends only to those specified in the bounty-land law, and upon the death of any such beneficiary without claiming such gratuity, his or her interest and title are wholly ended and foreclosed, and the interest in and title to the warrant either pass to the next in succession named in the statute or, if none such be named therein, die.

In this case, all those named in the statute as successively entitled to a bounty-land warrant on account of the service of this soldier have deceased without filing claim to such warrant. Title to such warrant has therefore lapsed under the law. The rejection of the appealed claim, is accordingly affirmed.

MARRIAGE—EVIDENCE—IMPEDIMENT—COHABITATION.

MARY SCHILLING (WIDOW).

Claimant was married to the deceased soldier in Michigan, in 1887. The evidence shows that prior to that time, from 1862 to about 1870, in the State of Pennsylvania, the soldier cohabited with one Anna Maria, and that four children were born to them during that period. There is no evidence that an actual marriage was entered into, and the cohabitation ceased without legal separation. Both remarried, and all the facts and circumstances indicate that no contract of marriage was made. Under the facts in this case a marriage contract will not be presumed. The soldier, therefore, was competent to enter into a contract of marriage at the date he married claimant.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
March 31, 1904.*

This is an appeal filed December 6, 1902, by Mary Schilling, of Detroit, Mich. August 21, 1899, she applied for a pension under the act of June 27, 1890, alleging that she was the widow of Martin Schilling, deceased, who served during the war of the rebellion in Company F, Sixth Pennsylvania Volunteer Heavy Artillery. In this declaration she averred that both she and her deceased husband had been previously married, and that their former consorts were dead. In a later declaration (September 23, 1899) she alleged her former marriage, but not that of Schilling; and in an affidavit filed October 6, 1899, she swore that the allegation in the first declaration was "a mistake because he had never been previously married."

The above claim, No. 703981, was rejected by the Bureau, April 3, 1902, as follows:

Approved for rejection on the ground that claimant is not the legal widow of the soldier, it appearing by a special examination of the case that at the time of her alleged marriage with him, soldier had a former undivorced wife (one Anna Maria) who survived his death.

It appears that the deceased soldier lived and cohabited with one Anna Maria from early in 1862 to sometime after 1870, and that four children were born during this cohabitation. They lived in Pittsburg, Cambria (Johnstown), and Hollidaysburg, Pa., and demeaned themselves as husband and wife, and were generally so known and accepted among their friends and acquaintances.

No record of their marriage has been found, nor was any witness found who knew of any ceremonial marriage between these parties. It seems quite clear that both parties were competent to contract marriage at that time, the soldier being a single man and Anna Maria the widow of one James McAree. Those who knew of the beginning of the cohabitation all testified that they believed that the parties had been ceremonially married, though none could give any information as to when and where they were so married.

Sometime after 1870 the soldier and Anna Maria separated, and the former with the oldest child went to Redfern, Mich., 10 miles distant from Detroit, where he resided until his marriage to claimant on September 28, 1887. From the latter date until his death, July 28, 1899, he resided in Detroit. The claimant testified that shortly after their marriage the soldier told her that he had been previously married and that his former wife was dead, and was buried at Redfern. She denied all knowledge of a former marriage prior to this time. It was, however, generally known among the soldier's acquaintances at Redfern, that he claimed to have a wife living in Pennsylvania, though prior to his marriage to claimant he told that he had heard of her death. It is in evidence that he spoke of his boys' mother (Anna Maria) as his wife, and acknowledged her as such while living at Redfern.

After the separation and on January 12, 1876, Anna Maria was married to one Thoinas Gledhill, under the name of McAree, the name of her first husband. After this husband's death she was married for the fourth time, on October 14, 1879, to Samuel T. Wood. July 11, 1900, she died at Pittsburg.

Samuel T. Wood, who survived Anna Maria, testified that she told him that she obtained a divorce from the soldier in Cambria County, Pa., and one of her daughters thought she had heard her mother speak of getting "separation papers" in Cambria County, though neither of these witnesses or others who were interviewed had any actual knowledge of any divorce proceedings. Upon a search of the records in Cambria County and other counties where Anna Maria had

resided, it was definitely ascertained that no divorce had been granted either to her or the soldier, Martin Schilling.

With the exception of one, it seems to have been the impression of all witnesses who knew these parties in Pennsylvania, that they were in fact married. Mary A. Benson, of Cambria, testified:

Anna Maria Schilling went under the name of "Fortune Teller," and men were constantly calling to see her. It got so public that Mr. Benson got them out of the house. She told me that she was not the wife of Martin Schilling, for I asked her why it was he let her go on so. She replied, "Well, we are not like you and your husband, as we are not married."

This statement is at variance with Anna Maria's subsequent claim of divorce, and with the soldier's acknowledgment of a previous marriage and the death of the former wife. It is not at variance, however, with all the known facts in this case. Their most intimate friends were unable to tell when and where they were married, and a most careful search failed to disclose any record of their marriage. Their subsequent remarriages without a divorce indicates that they did not consider their cohabitation in the light of a marriage. This is further indicated by the fact that the soldier with his son visited Anna Maria while she was living with Gledhill as his wife, and after her marriage to Wood. Certainly if they were then legally husband and wife some objections to her course would have been made by him. Her marriage to Gledhill under the name of McAree is another fact indicating no marriage with the soldier.

In Pennsylvania marriage is a civil contract to the validity of which the consent of the parties able to contract is all that is required (Sarah C. Hayden, 8 P. D., 364). A contract may be presumed from cohabitation and reputation, but they in themselves do not constitute a marriage (Hunt's appeal, 86 Pa. St., 294) and are in fact only circumstances to be considered with other competent evidence.

In this case there is no evidence of a contract, but the validity of a marriage between soldier and Anna Maria is dependent on proof of cohabitation and repute. The cohabitation ceased without any legal separation, and neither seems to have considered that any legal impediment existed to their remarriage. All the facts and circumstances indicate that no legal marriage contract was ever entered into. Their subsequent references, after remarriage, to their former marriage, in itself, in view of the known facts and circumstances, is not proof of a contract. They probably were due to a desire to shield the children born during their cohabitation from the stain of illegitimacy.

The Department is of the opinion that the evidence is insufficient to show a marriage between the soldier and Anna Maria. This being true he was competent to contract when married to claimant, and their marriage was legal. Claimant is, therefore, his legal widow, and the rejection of her claim under the act of June 27, 1890, is reversed.

COMMENCEMENT—ACT OF FEBRUARY 5, 1897—ACT JANUARY 3, 1893—
MEXICAN WAR—GRAY'S BATTALION.

JASPER N. ARMSTRONG.

Members of Gray's Battalion, Arkansas Volunteers, have no right to pension prior to the act of February 5, 1897, and they are entitled to a \$12 rating under the act of April 23, 1900, from such date, when the evidence shows them to be in the physical and financial condition required by the act of January 5, 1893, as held in the case of Markwood. (11 P. D., 380.)

Same case in 14 P. D., 285, modified.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions.
April 11, 1904.*

This motion for reconsideration, filed February 5, 1904, for the purpose of obtaining a review of the departmental opinion promulgated in the above-entitled case on January 15, 1904 (14 P. D., 285), contends that an error of law has been committed in said opinion. The claimant was pensioned under the special act of February 5, 1897, which gave a status to the surviving officers and enlisted men of Gray's Battalion of Arkansas Volunteers, and it is insisted that under said act and under the act of April 23, 1900, this claimant is entitled to have his pension commence from the date of the passage of the act of January 5, 1893. The Bureau held that claimant had no title to pension prior to February 5, 1897, and no title to increase prior to April 23, 1900, and this holding was affirmed by the Department in the following language:

This soldier is now entitled to pension under the provisions of the act February 5, 1897, and is entitled to the \$12 rate under the provisions of the act of April 23, 1900. * * * The action appealed from is affirmed.

This claimant never had any title to pension until February 5, 1897, on which date the members of his organization were made pensionable by an act of Congress, which reads as follows:

Be it enacted, etc., That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll the names of all the honorably discharged surviving officers and enlisted men of Gray's Battalion of Arkansas Volunteers, raised under the act of Congress of May thirteenth, eighteen hundred and forty-six, for service during the war with Mexico, and the names of surviving widows of such officers and enlisted men, subject to the limitations and regulations of the pension laws of the United States for pensioning the survivors of the war with Mexico.

The act of April 23, 1900, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the benefits of the act entitled "An act granting increase of pension to soldiers of the Mexican war in certain cases" be, and they are hereby, extended to all survivors of the Mexican war who are pensionable under existing Mexican war service pension laws, and who have become or may hereafter become wholly disabled from manual labor and in such destitute circumstances that eight dollars per month are insufficient to provide them the necessities of life, irrespective of the date of the granting of the said service pension.

The real issue in the motion under consideration is as to the date on which this claimant is entitled to a rating of \$12 per month, provided he comes within the law as to physical disabilities and pecuniary necessity.

The attorneys contend that the opinion in the case of Zachariah Winkler lays down certain principles which, if observed in the present case, would entitle this claimant to \$12 per month from the date of the passage of the act of January 5, 1893, and said act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to increase the pension of every pensioner who is now on the rolls at eight dollars per month on account of services in the Mexican war, and who is wholly disabled for manual labor, and is in such destitute circumstances that eight dollars per month are insufficient to provide him the necessities of life, to twelve dollars per month.

While the opinion in the Winkler case is not directly in point as to the issue herein involved, yet there is a basic principle discussed in said opinion which has application to the present case. The act of January 28, 1887, granted pension of \$8 per month to certain survivors of the Mexican war, but Winkler was not among that number. He was a member of Powell's Battalion, which was given a pensionable status by the act of March 3, 1891, and the question in the Winkler case was as to whether or not the members of Powell's Battalion were entitled to the benefits of the act of January 5, 1893. It was held in the Winkler case that members of Powell's Battalion were entitled to the benefits of the act of January 25, 1893, but that in no event were they entitled to any pension prior to the passage of the act of March 3, 1891, notwithstanding the fact that they were placed practically upon the same footing of those who were entitled under the act of January 29, 1887; in other words, members of Powell's Battalion were not entitled to any pension prior to the date of the passage of the act which gave them title and status. The act of January 5, 1893, was passed nearly two years subsequent to the act of March 3, 1891, and consequently the members of Powell's Battalion were held to be entitled to the benefits of an act passed after they had been given a right to pension. But, so far as the Winkler decision has any bearing upon the present case, it held that the members of Powell's Battalion could not be paid any pension prior to the date of the passage of the act which gave them title and status.

This holding, an eminently sound one, is further warranted by the opinion in Lee's appeal (6 P. D., 149), Lee being a member of Powell's Battalion. In the Lee case it was held that the act granting pensions to members of Powell's Battalion was a special act, and that, under section 4720 R. S., commencement could not antedate the passage of the act.

What has been said regarding the title and status of members of Powell's Battalion is equally true as to members of Gray's Battalion.

No pension can be paid the members of Gray's Battalion from any date prior to the passage of the act which gave them title; and it makes no difference as to this whether the rate be an original one or an increase rate granted under an original act.

It was demonstrated in the opinion in the case of Daniel Eveland (14 P. D., 40) that the act of April 23, 1900, contained no words of grant, or no date of commencement, and that it was necessary to go to the parent act to determine such matters. The parent act in the case under discussion, is the act of February 5, 1897; and, so far as the original opinion in this case held, that increase could not commence prior to April 23, 1900—which it seems inferentially to hold—said opinion was in error. The opinion in the case of Eveland settles this matter, and had said opinion been taken into consideration before the original opinion in the present case was promulgated, that part of your action relating to that particular issue would have been reversed.

By reason of the foregoing it is held: Members of Gray's Battalion, Arkansas Volunteers, have no right to the payment of any pension prior to the act of February 5, 1897, which gave them title, and they are entitled to a \$12 rating under the act of April 29, 1900, from such date, after February 5, 1897, that the evidence shows them to be in the physical and financial condition as required by the act of January 5, 1893. The precise date is to be determined under the opinion in the case of Markwood (11 P. D., 380), but in no case to antedate February 5, 1897.

The former opinion in this case is adhered to only so far as hereinbefore set forth, and as to the rest it is overruled.

**DISLOYALTY—JOINT RESOLUTION OF JULY 1, 1902—SECTION 4716, R. S.—
ACCRUED PENSION.**

REBECCA MEDLOCK (WIDOW).

Where a soldier died prior to the passage of the joint resolution of July 1, 1902, removing bar to payment under section 4716, Revised Statutes, as applied to the act of June 27, 1890, said resolution affords no remedy to those claiming under him in all cases where his right to pension had not been admitted, said suppositive personal right to pension dying with him.

But where a soldier's claim had been admitted and his right to pension, so far as section 4716, Revised Statutes, is concerned, had never been questioned in his lifetime, his widow may not be refused payment of his accrued pension subsequent to the passage of said joint resolution, upon the ground that he had rendered voluntary service to the Confederacy, a fact discovered after soldier's death.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 11, 1904.*

Careful consideration has been given to your recent communication of March 19, 1904, accompanying papers in the case of Rebecca,

widow of Robert L. Medlock, late of Company F, First Florida Volunteer Cavalry (certificate No. 554767), and inviting my attention to a suppositive conflict between the recent departmental decision in that case, rendered March 10, 1904, and the decision in the case of James H. Kelley (14 P. D., 104).

Your communication is as follows:

I have the honor to return herewith all papers in the claim of Rebecca Medlock, widow of Robert L. Medlock, late of Company F, First Florida Cavalry, together with your decision of March 10, bearing upon the question of her title to the accrued pension.

The soldier, who had a prior Confederate service, according to the evidence recently procured, died prior to the passage of the joint resolution of July 1, 1902, and under the practice of the Bureau, as affirmed in decision No. 25 of current series in case of James H. Kelley, his widow can have no greater right as his successor under his claim, than he had thereunder at the time of his death.

There exists this one difference between the two cases; in the Kelley case the soldier's claim had been rejected by reason of disloyalty, while in this claim Medlock was a pensioner at the date of his death.

Had the fact of his prior Confederate service been known, however, his name would have been dropped from the rolls, and under the practice as it has existed since the promulgation of the Winkler decision, volume 11, page 241, a widow is not entitled to the accrued pension where the soldier's name was illegally placed on the rolls. Under the latter decision accrued pension is denied where the allowance to the soldier was unlawful for any reason.

Reconsideration is requested for future guidance in similar cases.

The syllabus in the Kelley case (*supra*) is as follows:

The evidence fails to rebut the presumption from the records of the War Department of this soldier's voluntary aiding and abetting the rebellion.

He having died prior to the passage of the joint resolution of July 1, 1902, removing the bar of section 4716 as applied to the act of June 27, 1890, said joint resolution has no effect upon his claim under said act and does not remove said bar existing at the time of his death so as to entitle his widow to accrued pension under said claim.

In that case Kelley filed a claim for pension under the act of June 27, 1890; on October 23, 1894. The claim was rejected in September, 1896, on the ground that he had rendered voluntary service in the Confederate army. On October 16, 1901, he appealed, and on May 11, 1902, he died. His widow completed the prosecution of the appeal. She was not applying for pension in her own right; she was simply completing the soldier's claim.

In the case at bar the facts are different. Robert L. Medlock was pensioned from June 17, 1892, to the date of his death, under the act of June 27, 1890. No question of prior voluntary Confederate service was raised in his lifetime. There was no record evidence to that effect, and it may be said in passing, although that is not the present issue, that there is now no evidence that he ever did render service, voluntary or involuntary, to the Confederacy. Your action was based upon a supposition, because a special examiner reported that "it was the impression of a number of ex-Confederate soldiers" whom he

interviewed "that Medlock had served in the Confederate army," the widow being unable to disprove the charge.

That portion of the departmental decision of March 10, 1904, relating to the matter in issue, is as follows:

After the death of her husband, the widow applied for the accrued pension. He died June 2, 1902. He was last paid to May 4, 1902. She appeals from your action rejecting her claim for accrued pension January 28, 1904, which was taken on this ground:

"No title, the soldier having had a Confederate service and died prior to passage of act July 1, 1902."

Assuming that he did, no bar to payment is presented. In the cases of John Enfinger (13 P. D., 248) and Mary W. Craig (13 P. D., 259), the Department had already passed upon the effect of the first section of the joint resolution of July 1, 1902, holding that where disloyalty was a bar to the payment of money on account of pension under the act of June 27, 1890, said bar was removed. In effect, the first section of the resolution is retroactive. In this case, for instance, if soldier had been dropped from the rolls on May 4 or June 3, 1902, he would have been entitled to restoration. If on June 2, 1902, he was entitled to pension from May 4, 1902, so was she entitled to the accrued pension in the event of his death. Your action in this respect was clearly erroneous and it is reversed.

Sharply analyzed, there is no real conflict between the above decision and that in the Kelley case.

In the latter case the soldier's claim was involved and was never admitted. He had shown that he had served ninety days or more in the military service of the United States during the war of the rebellion; that he had been honorably discharged therefrom, and that he was disabled in a ratable degree. There was no reason why his name should not have been placed upon your rolls as a pensioner under the provisions of the act of June 27, 1890, because all the essential facts in the case showed that he came squarely within the terms of that act. But placing his name upon the rolls would not have availed him in his lifetime—not because of any defect in his status or title so far as the act of June 27, 1890, was concerned, but because he could not have derived any benefit from such action, Section 4716, Revised Statutes, interposed a bar to the payment of money on account of such pension:

No money on account of pension shall be paid to any person, or to the widow, children, or heirs of any deceased person, who in any manner voluntarily engaged in, or aided, or abetted, the late rebellion against the authority of the United States.

Throughout Kelley's life, this bar to payment existed. The bar was not removed until after his death, when the joint resolution of July 1, 1902, was approved. He had never acquired a "vested right" to pension in the sense in which that term is used in the act of December 21, 1893.

In the case at bar, however, soldier's right to pension was admitted. In his lifetime, it was not disputed. It had become a "vested right" to this extent; payment of his pension could not have been withheld on the ground of prior voluntary Confederate service, until the expi-

ration of a notice of at least thirty days, in accordance with the provisions of said act of December 21, 1893.

Soldier had been paid until May 4, 1902. Assume that notice, in compliance with the terms of the act of December 21, 1893, had been given subsequent to this last payment, May 4, 1902: it is in evidence that he died within thirty days of that date. Under the law, then, he had a "vested right" to the pension during that time, and this is the "accrued pension" now in controversy. Had he lived even the prohibition to payment thereof in section 4716, Revised Statutes, could not have operated to deprive him of his pension during that period.

But he died, and the widow is entitled to the accrued pension unless payment to her is barred by same law.

It was held in the Winkler case (11 P. D., 241), not as apparently understood by you that "a widow is not entitled to the accrued pension where the soldier's name was illegally placed on the rolls," but that section 4716, Revised Statutes, "positively prohibits the payment of the pension that may have accrued" to the widow. Said section provided that "no money on account of pension shall be paid to any person, or to the widow, children, or heirs of any deceased person," who had a prior voluntary Confederate service. Here was a direct prohibition of payment to the widow, operative at the time against her as well as against the soldier.

But, in the case at bar, this prohibition has been removed—removed by the first section of the joint resolution of July 1, 1902, passed within a month of soldier's death; and this resolution has been held to be substantially retroactive in the Craig and Enfinger cases (*supra*).

Where a soldier dies before July 1, 1902, his claim never having been admitted on account of the prohibition to payment contained in section 4716, Revised Statutes, and the widow is completing the prosecution of his claim, the question for determination when the case comes to this Department on appeal is, Was the Bureau's action erroneous at the time it was taken? This was the Kelley case, and your action was sustained upon appeal.

But where a soldier was in possession of a pension at the time of his death and there had never been a determination on your part, in his lifetime, that there were facts bringing his claim within the prohibition of said section 4716, his widow's right to the accrued pension was perfected. This is the Medlock case. There is now no bar to payment of this accrued pension to the widow, said bar having been removed, distinguishing this case from the Winkler case.

At the time you refused to admit the Kelley claim a bar existed forbidding payment of any money on the claim if admitted.

At the time you refused to pay accrued pension in this case said bar had been removed.

At the time you determined that Kelley was barred, on account of

prior voluntary Confederate service, your action was tenable under the then existing law.

At the time you determined that Medlock had rendered voluntary aid to the Confederacy, thus barring his right to payment, your action was untenable under the existing law.

Had Medlock lived until the time when you discovered that he had a Confederate service, assuming that he had one, you might not have dropped his name from the rolls and have declined to pay him the money which you refuse to pay the widow, because the only bar to payment has been removed. By parity of reasoning you may not now, after the passage of the joint resolution of July 1, 1902, withhold the accrued pension from the widow.

To summarize: Where a soldier died before the passage of said resolution and where his right to pension had not been admitted by you, the first section of the joint resolution affords no remedy to those claiming under him as his suppositive personal right to pension died with him. But where a soldier's right to pension had been admitted by you—never questioned in his lifetime—he dying before the passage of said resolution, his widow is entitled to receive such pension as you would have paid to him had he not died—i. e., the accrued pension; the bar to payment to her having been removed.

DECLARATIONS—PRACTICE—ACT JUNE 27, 1890—DISLOYALTY.

JANE COOK (WIDOW).

Under the provisions of the third section of the act of June 27, 1890, the averment in the declaration of the organization in which the deceased soldier served is unnecessary, and the allegation when made must be considered merely for the guidance and convenience of the Bureau. An incorrect allegation as to the particular service is not fatal, and when the actual service is ascertained the claim, if rejected, should be reopened and readjudicated.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 11, 1904.*

This is an appeal filed January 4, 1904, by Jane Cook, widow of Thomas K. Cook, and is from the refusal of the Bureau to grant her a pension under the provisions of the act of June 27, 1890, from the date of her original declaration, October 16, 1890, to the date of the subsequent declaration under which her claim (certificate No. 563081) was admitted.

In her first declaration she alleged that her deceased husband served ninety days during the war of the rebellion, was honorably discharged, was dead, and that she was his widow. In addition she averred that said service was in "Company H, First U. S. Colored Troops." This

claim was rejected June 2, 1891, on the ground "that the claimant's husband does not appear upon the rolls of the organization alleged."

Subsequently, some time during the later part of the year 1893, or the first months of 1894, evidence was filed showing that the allegation in this declaration was made through a mistake, probably in the office of the attorney representing claimant. With this evidence was forwarded the soldier's certificate of discharge showing service in Company H, First Alabama Volunteer Cavalry. It subsequently developed that the soldier had a prior Confederate service, and under the law as it then existed, this fact was a bar to the admission of her claim. This bar was removed, however, by the joint resolution of July 1, 1902, and under its provisions she was immediately invested with such title as she might otherwise possess from the date of her application. (Mary W. Craig, 13 P. D., 259.)

February 2, 1903, she filed a new declaration, alleging the correct service, and on November 18 of the same year her claim was admitted and pension allowed from the date of this last application—the "rejection of claim filed October 16, 1890," was "adhered to."

The rejection of the claim in 1891 on the grounds assigned, and in view of the evidence then before the Bureau, was correct and proper. Withal, except for the bar mentioned, which has since been removed, it is clear that claimant had title to a pension under the provisions of the act of June 27, 1890, at the date of her original application. The rejection was proper in that she failed to show that her deceased husband served for ninety days during the war of the rebellion. This rejection was not necessarily final, however, as it has been held that a pension claim is pending until finally allowed (William H. Hughes, 9 P. D., 152), and it has been the invariable rule since the promulgation of this decision to reopen and readjudicate claims when new and additional evidence is filed showing title to pension.

The evidence now on file clearly shows that claimant had title in 1890, and unless it appears that her declaration was insufficient in law, the refusal of the Bureau to reopen and readjudicate her original claim was error. A declaration is merely a statement in legal form of a cause of action or the nature of a claim. In pension claims it should set out definitely all necessary prerequisites to title—averments which, if proven, would establish the claimant's right to a pension. Under the third section of the act of June 27, 1890, the prerequisites to pension or necessary averments, as held in the case of Susan M. Minor (8 P. D., 263), are—

(1) That her husband served at least ninety days in the Army or Navy of the United States during the late war of the rebellion; (2) that he was honorably discharged therefrom, and (3) has died; (4) that she is without other means of support than her own daily labor, and (5) that she was married to said soldier prior to the passage of the said act.

This claimant alleged all these things, which, if proved, would establish her title to pension. In addition she alleged the date of the soldier's death, of her marriage, and the organization in which he served, the latter incorrectly. The act does not discriminate as between particular organizations, and knowledge of his particular service is only necessary that it may be definitely determined that the service was in the Army or Navy of the United States. Just as a knowledge of the dates of enlistment and muster out are necessary to determine that said service was for at least ninety days during the war of the rebellion, or the dates of the soldier's death and of claimant's marriage to show that the averments predicated on these events were true. In other words, these facts are merely matters of proof, and no particular date or dates of service are essential to title.

It is elemental that it is unnecessary to set out the particular facts relied upon to prove the essential averments of a declaration, and in declarations for pension the unnecessary allegations must be considered merely for the guidance and convenience of the Bureau. This claimant has shown title to a pension from the date of her original application, and her declaration of that date averred all essential facts of title, and was sufficient, even though it was misleading. When the actual service became known, and the bar heretofore mentioned was removed, her claim should have been reopened and admitted.

The action complained of is reversed.

MARRIAGE—LAWS OF OHIO—LEGITIMACY—EVIDENCE.

MINOR OF EDWARD PLOUNT.

1. A common law marriage may arise in the State of Ohio after the removal of an impediment, the lawfulness of said marriage being based not upon a new contract as a fact in evidence, but upon a presumption that a new contract was entered into.
2. The marital status in pension cases must be determined by the law of the State in which the marriage was consummated or according to the laws of the State in which the claim arises. A marriage under a certain state of facts being lawful in one State, it does not follow that a marriage in another State under an equivalent state of facts is a lawful one (act of August 7, 1882).
3. The legitimacy of a child for pensionable purposes is to be determined by the marital status of its parents under the act of August 7, 1882, or under section 4704, Revised Statutes. A State statute as to legitimacy of children has no force in pension claims.

Opinions in cases of minors of Perkins (13 P. D., 414) and of Plount (13 P. D., 541), overruled.

Opinion in case of minors of Pulver (10 P. D., 227), reinstated.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 11, 1904.*

Ethan A. Pray, as guardian of Edward, a son of Edward Plount, formerly a private in Company C, Fourteenth Ohio Volunteer Infantry, filed his declaration July 23, 1890, under the act of June 27, 1890, claim

being rejected April 5, 1892, on the ground that said Edward was not the legitimate child of the soldier. An appeal was filed July 3, 1901, and on June 23, 1903, the Department promulgated an opinion (13 P. D., 541) in which it was held that the minor was, under the laws of the State of Ohio, legitimate, and by virtue of the opinion in the case of the minors of Harvey Perkins (13 P. D., 414), he had status under the act of June 27, 1890. Anything to the contrary in the opinion in the case of the minors of Pulver (10 P. D., 227) was expressly overruled. The opinion in the case did not declare a pensionable title upon the minor, but held inferentially that the title was in Mary, a former wife of the soldier, the evidence not showing a divorce and the facts not warranting a presumption of death by lapse of time. The case was readjudicated, rejection had on grounds above mentioned, on February 15, 1904, and it is now again before the Department for consideration under appeal filed February 25, 1904.

A review of the evidence in this case discloses the following facts: Edward Plount, the soldier, on November 9, 1866, married by ceremony one Mary Tracy. She was a prostitute and continued such during her married life with Plount. In the spring of 1870 she left her husband announcing her intention to go to Kansas City, Mo., and resume her old life. Since her departure on the last-mentioned date she has never been heard from.

On May 15, 1871, in Ohio, this soldier married Caroline Inman by ceremony, and Caroline states he told her he had obtained a divorce from Mary in August, 1870; though it is noted that a careful search fails to disclose the record of any such divorce. Caroline lived with the soldier until his death, and Edward, the claimant herein, is one of the children born of this second marriage.

It is evident without discussion that the marriage between the soldier and Caroline was void at its inception, no divorce or death of the first wife having been shown. But the courts of Ohio, unlike the courts of last resort of many States, go often to a great length in upholding a marriage such as is shown between the soldier and Caroline. The first wife disappeared in the early part of 1870, and under the circumstances there is no question but what the courts of the State of Ohio would presume the death of the first wife at the end of seven years from the date of her disappearance, viz, the early part of 1877.

In the opinions in the cases of Frederika Kent (10 P. D., 211) and Elizabeth Adams (12 P. D., 212) the question in Ohio of a common-law marriage arising after an impediment was removed was most thoroughly discussed, and a careful review of the principles therein enunciated convinces the Department that the ruling in the Kent and Adams cases is correct. There is no question but what the courts of the State of Ohio do not compel the showing that a new relation has been entered into as a fact, but that they allow a presumption of a

new contract to obtain by reason of such conditions in evidence as would prove a common-law marriage. The Department is firmly of the belief, relying upon the opinion in the case of *Swartz v. State* (13 Ohio C. C. Reports), and the discussion of the principle therein involved, that the courts of Ohio would presume the death of Mary, the first wife of the soldier, and would presume a new contract between the soldier and Caroline after the presumption of the death of Mary had attached. This being true, Caroline must be held to have been the lawful widow of the soldier in question. It naturally follows then that the title to pension is, or has been at some time, in Caroline.

From the facts and law in this case several questions are involved which relate to the title to pension of a widow and minor children.

In the opinion in the case of the minors of Pulver (10 P. D., 227) the question of title under the general law as to widows and minors was thoroughly discussed. It was therein demonstrated that the title was first in the widow and then in the minor. Not that the title passed by procreation, or succession, from the widow to the child, but that the title of the minor was, by reason of the domestic relation, necessarily dependent upon the widow—the wife. That is to say, if the mother's union with the soldier was illegal, and the marital status void, and the child was the fruit of this illegal union, he was simply an illegitimate child, and could have title only as the Federal laws allow title in such a child. This is what the opinion in the Pulver case declares, and is clearly expressed in the following excerpt:

If there is no widow (death or divorce before the death of the soldier would make such a condition) then the title is placed in the minors. But note well that under such circumstances title is in the minors for the sole reason that there is no widow, and further, that there must at some time have been a legal wife, in whom, but for the happening of a certain event, the title would be, and that it is this title the minors take. * * * It is thus seen that the foundation of the title, so far as the minor is concerned, is in the widow; that is, in the wife of the soldier who is the mother of the children in question. The title does not shift to the children only upon the happening of certain events to the widow and mother. If there is no widow, if there has not been a legal wife, how shall there be a title in the children? * * * If the alleged widow, their mother, never had or could have title, the foundation is gone, and there is nothing on which to build a title for the children.

There is, possibly, a slight ambiguity to an extremely technical mind in the words "it is this title the minors take," referring to the legal wife's title; but it is plain, by the context, that it was not thereby intended to trace a title by procreation or succession, but that the whole argument was based upon, and directed to, the fact that the marital union of the mother and the soldier had been lawful.

The Pulver opinion was promulgated on May 31, 1899, and on July 10, 1901, the Department discussed, in the opinion in the case of the minor of Allan B. Pierson, a minor's title under the act of June 27,

1890, and collaterally, the widow's title under the same act. Said opinion states:

But the other question is the gist of this case, and its determination depends simply on the extent of the application that may be given to the proviso of the third section of the act hereinbefore quoted. Said proviso denies title to the widow who was not married to the soldier before the passage of the act. Can it be properly held that such prohibition extends to a minor because he is the child of a woman who was not married to said minor's father until after the passage of the act? This might be a correct holding if said minor had title by and through his mother only—if his sole rights to pension depended on the fact that he was the child of such mother. But so far from this being true, in no case does the minor's title depend on the mother's, except in so far as she may have priority of title as a widow. Otherwise, his title is independent—is of right in himself—and the basis thereof is that he is the legitimate child of his father—a soldier.

In this opinion, the same as in the opinion in the Pulver case, an extremely technical mind might experience some confusion as to a seeming ambiguity. In the above quotation the following is found: "In no case does the minor's title depend on the mother's * * * his title is independent—is of right in himself." These words have no reference whatever to a title, as it may be dependent upon the legality or illegality of a marital status. They are simply designed to convey the idea that the title in the minor is not acquired by procreation or succession, but that it is, under the act of June 27, 1890, independent of the widow's title. That is to say, if the marital status was a legal one and the claiming minor the child of the parties thereto, then the minor has title in his own right under the act of June 27, 1890.

Following the ruling in the Pierson case it was held, in the opinion in the case of James Still (12 P. D., 25), that a minor under the act of June 27, 1890, had title independent of his mother, and this ruling is followed in the opinion in the case of the minor of James R. Graves (13 P. D., 148). As a result of the holding in the Pierson, Still, and Graves cases, accepting the ruling to be that the minor could have title absolutely independent of its mother—that is, that the legality or illegality of the mother's marital status would not affect the child's status—the Department held in the opinion in the case of the minors of Harvey Perkins (13 P. D., 414), that inasmuch as the right of the minor was in himself he might be pensioned if he was the legitimate child of the soldier, his source of title being in his father; and that, if an illegitimate child at common law, he was made legitimate by a State statute, he would thereby have a pensionable status because he had it of right in himself through the father, the contrary opinion in the Pulver case being reversed. This appeared to be the only logical outcome of the principle enunciated in the Pierson case; but, as demonstrated herein, the language of the Pierson case was misconstrued and held to say something which it did not mean.

It is beyond discussion that the pensionable status of any person is

determined solely by the laws of the United States, and State laws can be applicable thereto only so far as the United States statutes allow them to govern. Section 2 of the act of August 7, 1882, declares that marriage in pension cases may be proven according to the laws of the State wherein the parties were married or the claim arises, but it says nothing regarding the pensionable status of children under such marriages. Section 4705 has to do with children of colored and Indian soldiers, and can not possibly have any application to the case at bar; but section 4704 deals directly with the point at issue, and bestows a pensionable status on—in fact, legitimatizes—children born before wedlock but acknowledged by the father before or after marriage. Section 4704, Revised Statutes, is as follows:

In the administration of the pension laws, children born before the marriage of their parents, if acknowledged by the father before or after the marriage, shall be deemed legitimate.

It would seem, by necessary implication, that in order for a child born of an illicit union to have a pensionable status there must have been a marriage of their parents; not a living together by the parents in a marital status, but a marriage in law as well as in fact. The minor's status so far as legitimacy is concerned may not be determined by the *lex loci*, as in the case in questions of marriage, but it must be determined by Federal statute, and the statute governing the case distinctly implies that there must have been a marriage—a legal one—between the parents at some time and an acknowledgment of the offspring of the union by the father.

When section 4704, Revised Statutes, and the act of August 7, 1882, are read in conjunction, the law as to widows and children, regarding their pensionable status, is clear and unambiguous. The marriage being valid under the act of August 7, 1882, it naturally follows that children born of such a marriage are legitimate. If, however, the child was born out of wedlock, he still may have status if he was acknowledged by the father either before or after the actual lawful marriage. So far as pensions are concerned, a child may be legitimate either under section 4704, Revised Statutes, or because his parents contracted a lawful marriage under the act of August 7, 1882; and this wholly by virtue of Federal statute.

A careful study of the principles underlying this issue convinces the Department that no child born out of wedlock can have a pensionable status under the general law, omitting cases which may arise under section 4705, or under the act of June 27, 1890, unless such child is clearly within the scope of section 4704, Revised Statutes. The proposition seems too clear to merit extended discussion.

The opinions in the cases of the minor of Harvey Perkins (13 P. D., 414) and minor of Edward Plount (13 P. D., 541) are hereby expressly overruled. The opinion in the case of the minors of Pulver (10 P. D.,

227) is reinstated as hereinbefore exemplified, and the opinions in the cases of Pierson (13 P. D., 151), Graves (13 P. D., 148), and Still (12 P. D., 25) are reaffirmed, as hereinbefore explained.

It is apparent from what has been said that the title of a minor is, in a sense, dependent upon his mother's title; that is, dependent upon the legality or illegality of his mother's marital status. His mother's marital status is to be determined by the law in the State in which the marriage took place, or in which the claim for pension arises; and it is to the laws of these different States that the Department must look in deciding the legality or illegality of marriage in pension cases. Not only the laws but the rulings of the courts are so widely at variance in the different States that, as stated in the opinion in the case of Fredrika Kent, *supra*, it is hazardous—

to refer, as to principles, to decisions of other States, even if the facts are the same or equivalent. The only safe procedure, in view of the terms of the act of August 7, 1882, is to follow closely on the steps of the appellate courts of the State in which the case arises; for a resort to doctrines laid down and decisions rendered in other States will generally lead, as to this particular issue, to inextricable confusion.

The opinion in the case of Germain (11 P. D., 66) has been cited by the Bureau in one of its communications regarding the case under discussion. The Germain case was one arising in the State of Mississippi, and was, in reality, decided according to the law of such State. Citations were, however, made in said opinion from the rulings of the courts in other States, and the impression is prevalent—perhaps not warranted by the language used—that the principles enunciated in the opinion in the Germain case were of general import and might be applied in cases arising in any of the States of the Union. Such, however, is not true, for the rulings of the courts of the State of Mississippi upon the point at issue in the Germain case are greatly at variance with the rulings of the courts in many of the other States. Each State of the Union furnishes its own law as to cases arising under the pension laws of the United States, so far as the marital status is concerned, and any statement apparently to the contrary in the Germain case is hereby expressly overruled. It is also noted in the Germain case, that it apparently holds that if the Government attacks the validity of a marriage other than the first, the burden of proof is upon the Government; citing in support thereof the opinion in the case of Jennette Burton (9 P. D., 31). This holding in the Burton case was expressly overruled in the opinion in the case of Mary J. Gilliland (13 P. D., 90), and in order that no confusion may hereafter exist, the apparent holding in the Germain case, contrary to the principles heretofore enunciated, is hereby expressly overruled.

From all of the foregoing the following is deduced:

1. A common law marriage may arise, in the State of Ohio, after the removal of the impediment, the lawfulness of said marriage being

based, not upon a new contract as a fact in evidence, but upon a presumption that a new contract was entered into.

2. The marital status in pension cases must be determined by the law of the State in which the marriage was consummated, or according to the laws of the State in which the claim arises. A marriage, under a certain state of facts, being lawful in one State, it does not follow that a marriage in another State, under an equivalent state of facts, is a lawful one (act of August 7, 1882).

3. The legitimacy of a child, for pensionable purposes, is to be determined by the marital status of its parents under the act of August 7, 1882, or under section 4704, Revised Statutes. A State statute as to legitimacy of children has no force in pension claims.

Cases of minor of Harvey Perkins (13 P. D., 414) and minor of Edward Plount (13 P. D., 541) overruled.

Case of minors of Pulver (10 P. D., 227) reinstated.

Cases of Pierson (13 P. D., 151), Graves (13 P. D., 148), and Still (12 P. D., 25), reaffirmed, as hereinbefore explained.

Attention is directed to the fact that another point discussed in the Still case is not at issue in the present case, but that, as to this other fact, the said opinion is discussed and explained in the opinion in the case of the minor of Rebenstorf, in the current series.

Action reversed.

DECLARATION—ACT JUNE 27, 1890—AMENDMENTS.

HARRIET DANIELS (WIDOW).

A declaration which, although failing to allege any period of service or the correct service of the soldier on whose account it is filed, nevertheless clearly shows, on its face, that it is intended to claim pension, as widow, under the act of June 27, 1890, is a valid declaration, subject to such amendment as may be necessary to adjudication.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 15, 1904.*

This appellant, Harriet Daniels, was allowed pension in August, 1903 (certificate No. 558625), under the act of June 27, 1890, as widow of Frank Daniels, formerly of Battery B, Third U. S. Colored Heavy Artillery, and deceased February 22, 1885, pension dating from August 10, 1901.

A claim filed November 8, 1892, was rejected, first, on January 8, 1898, on the ground that the War Department records fail to show said soldier ever enlisted as alleged in that claim, and finally on March 4, 1904, on the ground that her declaration in that claim was "informal, inasmuch as claimant failed to state therein the soldier's correct military service."

In this appeal, filed March 11, 1904, it is contended that said declaration is a valid though informal one, and is subject to amendment, stating the soldier's correct service, so that pension should commence from its date.

This case, although one under section 3 of the act of June 27, 1890, comes within the reasons, at least, of the general rule, so far as allegations as to service are concerned, of the instructions of July 28, 1897 (9 P. D., 93), which prescribed that—

Every application for pension under the second section of the act of June 27, 1890, should state that the same is made under said act, the dates of enlistment and discharge, the name or nature of the diseases, wounds, or injuries by which the claimant is disabled, and that they are not due to vicious habits: *Provided*, however, that the omission of any of these averments shall not invalidate the application (the intent to claim pension being manifest, and the declaration being executed in accordance with law), but such application shall be subject to amendment by means of a supplemental affidavit in the particulars wherein it is defective; said supplemental affidavit or affidavits to be read in connection with and as a part of the application itself; and *provided further*, That a declaration in the terms of the act shall be sufficient.

Substituting in this rule, for the conditions therein specified of title under the second section of said act, the conditions of title under the third section thereof, the same holding as to declarations under the latter section would follow. Both sections of said act require the same identical conditions as to service and discharge; and if the soldier, who has personal knowledge of the facts as to these conditions, is accorded, as he is by said rule of said instructions the benefit of an amendment to a declaration failing to allege these conditions, how much greater reason exists for according the same benefit to his widow, who has, perhaps, no personal knowledge of such facts, but must rely alone upon information and belief as to them.

This same question arose in the case of Judith S. Luckingbeal (9 P. D., 42), wherein the claimant, under section 3 of said act, failed to allege any period of service, but named the organization and referred to the pension claim of the soldier; and it was held such allegations were sufficient to constitute the declaration valid, because they directed the Bureau to record evidence on file therein showing whether the claimant had pensionable status as regards the service of the soldier.

In this case the soldier was never pensioned and never filed any claim for pension. The decisive fact in the Luckingbeal decision, therefore, is absent in this case. But even though there be not, in any case, in the Pension Bureau, a record of the alleged soldier's service, the records of the War Department from which to determine such service are always accessible to the Bureau, and the question of service may be determined in any such case as readily, almost, as if such record were already on file in the Bureau, as in the Luckingbeal case.

The law does not require that service shall have been rendered in any particular organization. The essential fact is merely that service

was rendered during the war of the rebellion, and the particulars as to the organization and dates of enlistment and discharge are important only as they may facilitate the proof of such fact. As this fact is provable solely by the records of the War Department, as held by this Department in numerous cases, a widow claimant can not well be required to do more than refer to such records, especially when, as in this case, she is ignorant of either the organization or the dates of enlistment or of discharge.

It is manifest from this declaration that she intended thereby to claim pension under the act of June 27, 1890, and all such declarations are within the rule of said instructions and valid, subject to amendment, however deficient as to the particular service on account of which the claim is filed.

This claimant did not marry the soldier in this case until sometime after his service. She could have, therefore, no personal knowledge as to his service, and may well have been ignorant of it entirely. She had, in fact, only slight information as to a few uncertain details of such service, which she subsequently alleged, and from which it appears his correct service was finally ascertained. These subsequent allegations should be held as supplemental, as they in fact were, to her original declaration, and pension should be allowed from its date.

The action appealed from is therefore reversed, and you will readjudicate that claim accordingly.

MARRIAGE—SLAVES—REMARRIAGE—EVIDENCE.

CHRISTIE ANN THOMPSON AS WIDOW OF LEWIS ROBINSON.

The evidence shows the claimant remarried at some time after the soldier's death, but fails to show when such marriage was contracted. Her claim, therefore, must stand rejected for lack of proof of a material fact as to her pensionable status, viz, the date of said remarriage.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 15, 1904.*

This appellant, Christie Ann Thompson, on December 15, 1900, filed this claim, No. 709452, for pension under the Revised Statutes, as formerly widow of Lewis Robinson, who died August 6, 1863, at Goodrich Landing, La., while a member of Company E, First Arkansas Colored Infantry; she remarrying, by ceremony, Moses Thompson, on November 30, 1877.

Said claim was rejected January 9, 1904, on the ground of—
claimant's inability to show by competent evidence that she is the legal widow of soldier (see opinion of Chief Law Division dated December 21, 1903);
and she appealed April 2, 1904, contending that the evidence shows she was the soldier's wife up to his enlistment and his widow up to her marriage to said Thompson.

The Chief of the Law Division in his opinion, upon which rejection of claim is based, states the evidence fails to show—

that claimant was the legal widow of the soldier from the time of his death in 1863 until 1877, when she entered into said marriage ceremony with Thompson.

It is shown by the testimony of the claimant's slave mistress that she and soldier were united, under slave customs and with said mistress' consent, as husband and wife and lived together as such, in Mississippi, up to shortly after February, 1863, when said mistress, with her slaves, removed to Arkansas, and then claimant and soldier ran away, going toward Helena, Ark., where there was a camp of Federal soldiers.

It is further shown by the testimony of two comrades of the soldier that he and claimant came together to said camp claiming to be husband and wife, and thereafter lived together as such until his enlistment, and even cohabited occasionally at quarters after his enlistment while the company remained at Helena.

This evidence sufficiently establishes, under section 4705 of the Revised Statutes, a marriage between claimant and soldier; and the only question in this case is as to a subsequent marriage of claimant.

Her whereabouts after the soldier's death up to March, 1870, is not shown by any testimony. It is shown by the testimony of two witnesses, however, that she then came to a place near Brownville, Tenn., with a crowd of several negroes from Memphis, Tenn., to work for a man named Bradford, and that she then came with a man named Willis, claiming to be his wife, and with whom she lived for several years thereafter as his wife, until he got to running around a good deal and finally left for good.

The special examiner states the records of Carroll County, Tenn., show a marriage license was issued to said Willis and Jane Pigeon on February 3, 1876, but no return upon such license appears ever to have been made, and his whereabouts since 1872 or 1873 has not been ascertained.

There is record evidence of claimant's marriage to said Thompson in Louisville, Ky., under the name of Christie A. Willis.

Claimant denies strenuously any matrimonial or other intimate relations with said Willis, but admits she went to church and elsewhere repeatedly with him, was often called Ann Willis, though she repudiated the name then, she says, and was much talked of in connection with him; that people said they ought to marry; that he, in fact, asked her to marry him, and she could have had him if she had wanted him. She denies he and she ever lived at all together, although the whole crowd, she says, which came together from Memphis remained together, living in the same house for some time, one doing the cooking for all. There were in this crowd two married couples, she says, and herself and said Willis, and it was because of this that she and he went so much together and were spoken of together.

She does not, however, assign this association with said Willis as the reason for her name appearing in the record of her marriage to said Thompson as Christie A. Willis, but says such name was probably given by said Thompson because it was her "nickname" in slavery, given her because she did a man's work in the fields, plowing, chopping wood, etc.

This explanation by her is not supported by any corroborating testimony, and both her old mistress, above mentioned and also a fellow-slave, a half-brother of the soldier, have no recollection of the name of Willis.

The conclusion from the evidence is irresistible that the claimant and said Willis were married. There is no testimony aside from her own controverting that of the two witnesses who say she and said Willis claimed to be husband and wife when they came from Memphis in March, 1870, and cohabited as such for several years. This is sufficient evidence to establish a common-law marriage between her and said Willis, and such marriages are valid either in Tennessee (Mahala Viles, 12 P. D., 468) or in Mississippi (Minerva Brown, 11 P. D., 266), where she says she first met him at a wood yard where she worked for a few weeks before going to Memphis.

Such being the force and effect of the evidence herein, it devolves upon the claimant to furnish evidence as to the inception of her proven relations with said Willis, which must, under the evidence, be presumed to have been matrimonial; for her pensionable status as widow of the soldier ceased upon any subsequent marriage.

As held repeatedly by the Department, the burden of proof in a pension claim is upon the claimant, throughout the adjudication of such claim, to establish by satisfactory evidence all material elements of title, one of which, in the case of a widow claimant who remarried after the soldier's death, is the date of her remarriage. As stated, there is nothing in this case in support of the claimant's statements as to when her relations with said Willis began, nor any evidence tending to show such fact. Her claim must fail, therefore, for lack of proof of this material fact.

The rejection of the appealed claim is accordingly affirmed.

**MARRIAGE—DIVORCE—RESTORATION UNDER ACT OF MARCH 3, 1901—
EVIDENCE—DECREE NISI—ESTOPPEL.**

RUTH A. PITKIN AS WIDOW OF CARLOS R. BUGBEE.

1. A divorce nisi in Massachusetts does not dissolve the marriage relation. Until the decree is made absolute, coverture continues.
2. Absolute divorce, after the expiration of six months from rendition of decree nisi, is not in the nature of a decree nunc pro tunc; coverture for any purpose, except cohabitation, is not terminated at any time prior to decree absolute.

3. A claim for restoration under the act of March 3, 1901, executed during the term of a decree nisi, is invalid.
4. Presumption of death attaches in Massachusetts as at common law.
5. Where an allegation of death of a spouse, insusceptible of proof by primary evidence, is followed by the filing of a libel for divorce, based upon desertion of said spouse, libellant is not afterwards estopped from invoking presumption of death; but the allegation in the libel may be considered as evidence upon the question of rebuttal of presumption.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 15, 1904.*

Carlos R. Bugbee, Company H, Eleventh Vermont Volunteer Infantry, died February 25, 1865, leaving a widow, Ruth A. Bugbee, who was subsequently duly pensioned under the general law (Ctf. 73916) from said date until November 26, 1867, when she remarried one Albert E. Pitkin.

On March 14, 1901, she applied for restoration under the provisions of the act of March 3, 1901, alleging that her said second husband, Albert E. Pitkin, was killed by the Apache Indians, in Arizona, in June, 1890. This declaration was supplemented by an affidavit in which she more particularly set forth the circumstances of her second husband's demise. She stated that in June, 1890, said Pitkin became one of a party leaving Tucson, Ariz., to prospect for mineral in the mountains. Her husband wrote her that she would probably not hear from him for three weeks. As a matter of fact, she states, she never heard from him, and that "after a long waiting" word was received that the whole party had been killed by the Apaches. There was no survivor to tell the tale. A special examination was ordered. After the examination of the claimant had commenced, she declined to proceed further, if it was incumbent upon her actually to prove the fact of Pitkin's death. There was a shorter way to establish her pensionable status, she said. On September 26, 1902, the claim was rejected on the ground of her inability to prove her second husband's death and upon her declination to make further effort.

Her "shorter way," it seems, was to secure a release by judicial decree, from the bonds uniting her in matrimony to said Pitkin, if her bonds were not already dissolved by his death according to rumor and to her averment in her declaration of March 14, 1901.

In September, 1902, she filed a libel for divorce in the superior court for the county of Worcester, Mass., alleging that her said husband, Albert E. Pitkin, at Tucson, in May, 1891, "utterly deserted her," and had continued such desertion from that time to the date of filing libel. Order of notice by publication was duly complied with, and the libellee made default. Whereupon, on May 14, 1903, the court ordered that a decree of divorce nisi be entered, said decree to become absolute, unless otherwise ordered, after the expiration of six months

from the entry of said decree. Thus, before November 14, 1903, the decree could not become absolute.

Yet on November 13, 1903, she executed a new application for restoration under the act of March 3, 1901, alleging her divorce from her second marriage. This declaration was filed on November 14, 1903. On February 4, 1904, the claim was rejected on the ground that said declaration was executed November 13, 1903, before her divorce from her second husband was obtained and therefore before her right of action accrued. In short, the declaration was invalid—a mere nullity.

It is from this action that she appeals. She assigns the action regarding this declaration a nullity, as error. It is also urged in her behalf that her husband's death is insusceptible of direct proof and that it was unjust to reject her claim upon the ground of her inability to prove his death.

Claimant's pension ceased at the time of and on account of her remarriage to Pitkin. To obtain restoration it is essential that this last period of coverture should have been terminated, either by the death of Pitkin or by divorce from him on her own application and without fault on her part. In short, from feme covert, she must revert to her condition as feme sole before she is in a position to apply for relief under the act of March 3, 1901. On November 13, 1903, had she? Not until November 14, 1903, under the order of court and the statutes of Massachusetts, could the decree become absolute. What was her status between May 14 and November 14, 1903?

A divorce nisi under St. 1870, c. 404, does not put an end to the marriage relation. (*Fox v. Davis*, 113 Mass., 255.)

Until the decree is made absolute "the marriage relation between the parties continues to subsist." (*Moors v. Moors*, 121 Mass., 232.) A decree nisi is "in the nature of a divorce from bed and board, not absolutely dissolving the bond of matrimony between the parties." (*Garnett v. Garnett*, 114 Mass., 347.) See also *Graves v. Graves* (108 Mass., 314-320); *Sparhawk v. Sparhawk* (114 Mass., 355); *Wales v. Wales* (119 Mass., 89); *Chase v. Webster* (168 Mass., 228).

Cook v. Cook (114 Mass., 163) is a case in point. One Mrs. Cameron sought and obtained a decree nisi from her husband. On November 20, 1882, she filed a petition to have the decree made absolute. On November 21, 1882, the prayer was granted and the decree became absolute. On November 20, 1882, the date of filing petition for absolute divorce, Mrs. Cameron married Cook. The action of *Cook v. Cook* was a libel filed by the husband, setting forth libellee's incapacity to marry him on November 20, 1882, she being then the wife of said Cameron. The court, following numerous precedents, held that the decree nisi did not dissolve the marriage between Mrs. Cook and Cameron. Moreover, the court said that the decree absolute did not relate back either to the time of filing petition for

absolute divorce or to any time prior thereto, i. e., that the decree absolute was not a decree nunc pro tunc, there being no authority for such a decree.

So far as said decree is concerned, the claimant can not be considered a feme sole on November 13, 1903. She was still bound by the disqualifying coverture and in no status to execute the application in question, unless said marriage has been dissolved by Pitkin's death. To that extent wherein the Bureau holds that the application executed on November 13, 1903, was invalid on the ground that her right of action had not accrued by virtue of said decree nisi, the Department finds no error.

But there may be other grounds justifying a determination that she was feme sole not only on November 13, 1903, but on March 14, 1901. She is under no obligation to prove by primary evidence that her marriage to Pitkin was dissolved by his death. It may be shown circumstantially. Presumption of death may attach. From 1890 to 1901, eleven years, Pitkin had been absent, unheard from, and he disappeared under circumstances possibly warranting the inference that his death, in point of time, occurred long before the lapse of seven years. That death may be presumed is a well settled principle in Massachusetts. See *Newman v. Jenkins* (10 Pick., 515); *Loring v. Steineman* (1 Met., 204); *Kelly v. Drew* (12 Allen, 107); *Flynn v. Coffee* (12 Allen, 133); *Commonwealth v. Thompson* (11 Allen, 23); *Stockbridge, pet.* (145 Mass., 517); *Marden v. Boston* (155 Mass., 359).

The fact that claimant filed a libel for divorce, implying that her husband was alive at that time, may not be inconsistent with the presumption of his death. She claims that a special examiner told her that the special examination would take a long time. Her attitude was that her husband was dead; the Bureau's position seemed to be that he was alive. If he were alive, then he was guilty of desertion—a ground for divorce. As an expedient to gain time, the "shorter way," she adopted this theory and applied for divorce. She is not thereby estopped from urging the presumption of death. At the most her conduct might be treated as evidence in the direction of rebuttal of presumption of death.

It is noted that her dependency within the meaning of the act of May 9, 1900, has not been satisfactorily established.

The case is remanded for further action. First, you will ascertain her dependency, a fact essential to restoration. If that is established, you will then request claimant to elect whether she will proceed under her declaration filed February 17, 1904, based upon her divorce from Pitkin, or upon her first declaration for restoration, predicated upon Pitkin's death. In the latter event, the special examination will include within its scope all facts surrounding the disappearance of Pitkin in 1890.

You will report your ultimate action to this Department.

MARRIAGE—PRESUMPTION OF DEATH—EVIDENCE.

ELIZA BREEZLEY (WIDOW).

Soldier, about 1856, married Catherine Vernon, from whom he was separated, but without divorce, in 1857, when she left the State of Illinois, where the parties resided, for Missouri. She was never afterwards heard of, except by general rumor to the effect that she died in 1860. In 1869 he married the claimant by ceremony.

Held: That under the decisions of the supreme court of Illinois presumption of death of Catherine attaches in favor of the validity of the soldier's marriage to the claimant, who is therefore his widow.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, April 15, 1904.

William P. Breezley, late of Company A, Twenty-fifth Illinois Volunteer Infantry, was formerly a pensioner under the general law, at the rate of \$15 per month, which he received from May 15, 1889, on account of rheumatism and injury to right shoulder. On June 12, 1897, he filed a claim for increase which was pending adjudication in the Bureau when the soldier died, May 8, 1898.

On May 31, 1898, Eliza Breezley, the appellant, filed an application claiming to be soldier's widow and asked that she be allowed to complete the soldier's pending claim. She also claimed title to the accrued pension. This application was rejected November 11, 1902, on the ground that the claimant, the soldier's alleged widow, had no title to complete the claim as she was not the legal widow of the soldier, for the reason that she was unable to show the death or divorce of a former wife.

On the date of filing the new application she also filed a claim for pension under the act of June 27, 1890. On February 2, 1900, she filed a claim under the general law. Both of these claims were rejected November 11, 1902, in the following language:

Approved for rejection on the ground of no title—claimant's inability, although aided by a special examination, to show death or divorce of the soldier's second wife, Catherine Breezley, prior to the marriage of the claimant; hence, not the legal widow of the soldier.

On November 22, 1902, an appeal was taken, the appellant contending, first, that the Bureau erred in refusing to allow her to complete the soldier's claim and to pay her the accrued pension due soldier at date of his death; second, in rejecting his claim for pension under the act of June 27, 1890, on the ground that she was not the legal widow of the soldier; and, third, in the action rejecting her claim for pension under the general law.

It is thus apparent that the only question raised by the pending appeal is whether this appellant is the legal widow of the soldier.

The facts in this case appear to be as follows: William P. Breezley, whose residence was Georgetown, Ill., and who was the alleged husband of this appellant, in the year 1854 was married to one Verlenda Eveline Cloe, with whom he lived until her death in 1856. Shortly afterwards (the exact date does not appear in evidence) said Breezley entered into a second contract of marriage with one Catherine Vernon, with whom he lived for about four or five months. From cause not appearing in evidence, and about the year 1857, there was a separation between Breezley and his second wife, Catherine, and the latter, together with her parents and family, removed from their home in Georgetown, Ill., to Missouri. So far as any evidence is on file, nothing was ever heard of Catherine from said time until the present, with the single exception that the evidence obtained on special examination tends to show that said Catherine died about the year 1860—at least, it seems to be the general impression of the older residents and acquaintances of the Vernon family who now live at Georgetown, Ill., that word was brought back there about the beginning of the war that Catherine Breezley, formerly Catherine Vernon, was dead.

William P. Breezley, the husband of Catherine, remained in the vicinity of Georgetown until the outbreak of the civil war, when, on June 1, 1861, he enlisted in Company A, Twenty-fifth Illinois Volunteer Infantry, and served with his regiment until the expiration of his term of enlistment on September 5, 1864. Immediately he returned to his old home, where he lived, at least most of this time, until his death in 1898. It may be well to state that from the time Catherine Breezley separated from her husband and went to Missouri, in 1857, there is not a word of evidence that she was ever seen alive or that anyone ever heard that she was alive. Neither is there any evidence to explain the long and continued silence of Catherine nor any intelligence of her existence if she lived.

On December 24, 1869, the soldier married the third time. This time he married in Illinois Eliza Trasser, formerly Eliza Clayton, the appellant in this case. She was also a resident of Georgetown, Ill. The soldier lived with Eliza from the time of their marriage in 1869 until his death, May 8, 1898; in other words, a period of twenty-nine years. There were born to this union two children, who are both now living.

Under the provision of the act of August 7, 1882, such marriages as are involved in this case are to be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time the marriage was contracted, or at the time when the right to pension accrued.

It is a well-established rule of law that a person shown not to have been heard from for a period of seven years by those (if any) who, if

he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death (1st Greenleaf on Evidence and Authorities; *Davie v. Briggs*, 98 U. S. Reports, 535).

This principle of law, which is universally recognized by all courts, is applicable to the facts in this case. Catherine Breezley, née Vernon, separated from the soldier about the year 1857. From the time of her separation and the time of her removal from Georgetown, Ill., to Missouri, as stated before, there is not a scintilla of evidence to prove her existence. The mere fact that she separated from her husband would not forever bar her from her friends and acquaintances, nor is it to be presumed that she would not have some friends in her old home who would have intelligence of her existence if she lived. The evidence obtained under special examination goes to strengthen this theory. A careful examination of all papers shows that the special examiner when taking testimony in this case made every effort to ascertain from the old residents of Georgetown, Ill., and the acquaintances of the Vernon family, if Catherine Breezley was alive. The only evidence obtained, and every fact in the case goes to show that a report came back to Georgetown about the beginning of the civil war that Catherine Breezley was dead.

Again, it is established by the evidence that said William P. Breezley remained in the vicinity of his old home from the time of his separation from Catherine, which was about the year 1857, until his death, in 1898, with the exception of three years and three months which he spent in the service. He was not married to Eliza Trasser, née Clayton, for a number of years after the law would presume Catherine's death. In fact, he was not married to Eliza until December 24, 1869, about twelve years after his separation from Catherine. It is not reasonable to presume that if Catherine had been alive she would stand by, knowing, as she undoubtedly would, of his marriage to Eliza and without a legal right to do so, and not proclaim herself as his legal and lawful wife. The only theory that can be advanced in this case is that Catherine Breezley, the soldier's second wife, was dead. At least the presumption of law is that a person who for seven years has not been heard of by those (if any) who, if he had been living, would naturally have heard of him, is presumed to be dead.

The supreme court of the State of Illinois in the case of *Johnson v. Johnson* (114 Ills., 611), in discussing the question as to the validity of a second marriage, after a long-continued absence of a former husband, said:

The presumption of innocence and of the validity of a marriage conflicts with the presumption of life, and if neither presumption is aided by proof of facts or circumstances cooperating with it, the presumption of the validity of a marriage has generally been held to be the stronger and to prevail over the presumption of the continuance of the particular life.

In the case of *Schimisseeur v. Beatrice* (147 Ill., 210) the court said:

Where a marriage has been once solemnized according to the forms of law, every presumption will be indulged in favor of its validity. This presumption is so strong that a former husband or wife will be presumed to be dead after an absence of less than seven years. The ordinary presumption in favor of the continuance of human life is made to give way to the presumption in favor of the second marriage.

Another leading case in Illinois which appears clearly in point with the present case under consideration is that of *Harris v. Harris* (8 Ill. App., 57). This case was one wherein a petition of divorce was filed by the husband against the wife, seeking to declare the marriage void because the wife had a former husband at the time of the marriage of the parties and the doctrine hereinbefore set forth was affirmed.

Further citation of authority will be unnecessary as those cited sufficiently show the trend of judicial determination on this subject. As far as it appears from the testimony on file in this case there is not a word of evidence that at the time the soldier entered into his contract of marriage with Eliza Trasser, in December, 1869, his second wife, Catherine, was living. On the contrary, the evidence all tends to prove that she was dead. The soldier and this appellant lived together as husband and wife for twenty-nine years, during which time two children were born, both of whom are now living. During most of this time they lived in the soldier's old home, the same place where he married the first time, where his first wife died, where he married Catherine, his second wife, and where they separated, and where, after waiting twelve years, he married this appellant. During the many years that Eliza Breezley and the soldier lived together as husband and wife there is not a word of evidence bringing in question the validity or legality of his last marriage.

There appears to be no question as to regularity of the marriage between the soldier and Eliza Trasser according to the manner and form as provided by the laws of the State of Illinois. In view of the law which is applicable to such questions as are involved by the appeal in this case, and the decisions of the Illinois courts, the Department can arrive at no other conclusion than that this appellant is the legal widow of the soldier, William Breezley. Your actions in rejecting the widow's claims upon the ground stated were erroneous, and the same are accordingly reversed.

MARRIAGE-COHABITATION. ACT OF JUNE 27, 1890.

PEGGY CHURN (ALLEGED WIDOW).

The appellant and soldier began living together in the State of Virginia some time during the year 1867, where they continued to live and cohabit as husband and wife until the date of his death, which occurred August 4, 1890, but were never married under a license or by any ceremony.

Held: That, under the laws of the State of Virginia, where a common-law marriage is not valid, claimant and soldier were never lawfully married, and, therefore, she is not his legal widow and has no pensionable status under the act of June 27, 1890.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 15, 1904.*

This appellant, Peggy Churn, on January 9, 1893, filed a claim for pension under the act of June 27, 1890 (Claim No. 569144), alleging that she was the widow of Walter Churn, who served as corporal in Company F, Ninth U. S. Colored Volunteer Infantry, from November 16, 1863, to November 26, 1866, and who died August 4, 1890.

Said claim was rejected by the Pension Bureau August 22, 1902, and the reason for such action is stated on the face brief as follows:

Approved for rejection on the ground that claimant was not the legal wife of soldier, her marriage to him having been invalid for want of license and ceremony, common-law marriages not being valid in Virginia, the State in which she and soldier cohabited.

September 8, 1902, claimant's attorney appealed from said action of the Bureau, contending, in effect, that claimant and soldier began living together as husband and wife by mutual consent prior to his enlistment in the army, continued so to live and were recognized as husband and wife in the community in which they lived until the time of soldier's death, and that these facts were sufficient to constitute a valid common-law marriage.

This is a claim under the act of June 27, 1890, and the question of the validity of claimant and soldier's marriage by the act of August 7, 1882, is governed by the laws of the State where they resided at the time of marriage, or at the time when the right to pension accrued. This was the holding of the Department in the case of *Eliza J. Ellis* (12 P. D., 159).

Claimant and soldier lived in the State of Virginia, and the affidavits filed in support of her claim tend to show that she was his slave wife there, and that they began living together, by consent of their masters, some time prior to his enlistment, and lived as husband and wife until the date of his death, except what time he was in the service. On special examination these witnesses did not sustain their former statements as to the time when soldier and claimant first occupied to each other the relation of husband and wife. It appears from claimant's testimony before the special examiner that she had no slave husband, but that she and soldier engaged in illicit intercourse, and as a result she gave birth to a child soon after he enlisted, but she stated: "No one knew anything about our relations then, as they were secret." She also testified that she and soldier were never married by any ceremony, but that "We first commenced to live together after he was discharged

from the army." Claimant's statements as to the time she and soldier began living together as husband and wife are corroborated by other witnesses. It is shown clearly that they began living together in this relation some time during the year 1867. It does not appear that they intended prior to that time to occupy the relation of husband and wife; did not so consider each other, and were not so recognized by the people in the community in which they lived. Their relations prior to 1867 were meretricious, and any subsequent contract of marriage could not change the nature of these past acts. The legal marital relation begins at the time the parties formally enter into the marriage contract.

February 27, 1866, the legislature of Virginia passed an act legalizing the marriage contracts of all colored persons of that State who had agreed to occupy the relation of husband and wife and were cohabiting together as such at that time. But since claimant and soldier had not entered into any marriage contract and did not cohabit as husband and wife until after the passage of this act they were not entitled to the benefits of its provisions.

Claimant and soldier, by mutual consent, lived together as husband and wife from some time during the year 1867 to date of his death, August 4, 1890; they were so recognized by their neighbors; and they reared a large family of children, which they recognized as their legitimate offspring. Every essential of a common-law marriage was present, and the only question to be determined is whether such marriage is valid under the laws of the State of Virginia.

Section 2222 of the Code of that State, which has been in effect since 1849, is as follows:

Every marriage in this State shall be under a license, and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be affected on account of any want of authority in such person, if the marriage be in all other respects lawful; and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

There appears to be no record that the first clause of this statute was ever construed by the supreme court of appeals of Virginia until 1902, when it became necessary to do so in the case of *Offield v. Davis* (40 S. E. Rep., 910). In this case appellant contended that she became the common-law wife of James F. Offield in April, 1865, and was regularly married to him under a license on March 25, 1879, and claimed dower against the estate of her deceased husband from the time she became his common-law wife in 1865, and that this right of dower was paramount to the liens of judgment creditors. This case presented the question directly to the court, Is a common-law marriage valid in Virginia? In considering this question the court reviewed the laws

governing marriage in that State from its earliest history, and among other things said:

When a statute admits of two interpretations—the one destructive of the foundation of society, and inimical to the peace, welfare, and good order of a people, and the other conducive to their welfare, and adding strength and durability to the foundations of society—the latter we unhesitatingly think should be adopted.

Our statute (now section 2222 of the Code) when read in the light of the statutes leading up to it, and which are *pari materia*, admits we think, after the careful consideration that the gravity of the subject required, of but one construction; and that statute is the same that was in force when it is alleged appellant became the common-law wife of James F. Offield.

In further commenting on the laws governing marriage in the State of Virginia, and in the final disposition of the case, the court referred to the case of *Eldred v. Eldred* (97 Va., 606), in which the question was as to the proof of a marriage alleged to have been contracted in the city of Washington, and said:

As was said in that case, "Our marital laws are plain and simple—not difficult to understand by the humblest citizen." They have in fact been so fully understood, and lived up to since the earliest history of our Government that, as we have stated before, there is no record of a case in this court in which it was contended that a marriage in this State, entered into without conformity with the requirements of our statutes, is valid. If such a marriage in this State could be held valid it would seem to have been a useless effort on the part of our legislature, by certain acts passed, to protect innocent offsprings of an illicit cohabitation. (Section 2553, 2554, of the Code.)

The latter clause of section 2222 of our Code applies only to the mode prescribed as to the solemnization of marriage, and in no sense qualifies the previous clause of the section prescribing that "every marriage in this State shall be under a license and solemnized in the manner herein provided."

We are therefore of opinion that the enactment of that statute wholly abrogated the common law in force in this State on the subject of marriages, and that no marriage or attempted marriage, if it took place in this State, can be held valid here unless it has been shown to have been under a license, and solemnized according to our statutes.

According to the opinion quoted from above, the first clause of section 2222 of the Code of Virginia is mandatory and not directory and makes a license and solemnization according to the statutes essential to the validity of a marriage in that State. However, the statutes do not expressly provide how the marriage shall be solemnized. According to the second clause of section 2222 the validity of a marriage shall not be questioned for want of authority in the person solemnizing the same if it is believed by one or both of the parties that such person is duly authorized, and there are other statutes providing what classes of persons shall be authorized to solemnize marriages, and how they shall be authorized. It is implied in the language of these statutes that a marriage shall be solemnized in some manner by persons duly authorized, but the manner is not expressly provided.

However, it is not necessary in this case to determine as to what mode is essential to the solemnization of a marriage, for there is the

precedent condition to the validity of a marriage in that State that it shall be under a license. Claimant and soldier were never married under a license, and, therefore, according to the laws of the State of Virginia, no valid marriage ever subsisted between them.

While the statutes of Virginia provide that marriages in that State shall be under license and solemnized in some mode, yet they contain no express words invalidating marriages in which the statutes have not been complied with. Many of the States have enacted similar statutes but they are generally construed by the State courts to be directory only and not mandatory. So also did the Supreme Court of the United States in the case of *Meister v. Moore* (96 U. S., 76) consider the statutes of Michigan on the subject should be construed. It has been suggested, therefore, that the holding of the supreme court of appeals of Virginia in the case of *Offield v. Davis*, that a marriage in that State was not valid unless the statutes regulating the same were complied with, though they contain no express words nullifying the same, conflicted with the holding of the Supreme Court of the United States on the same question.

In considering the case of *Meister v. Moore* the Supreme Court of the United States followed the line of thought leading up to the conclusion that unless statutes regulating marriages contained express words of nullity they should be construed as being directory only, but the court said:

If there has been a construction given to the statute by the supreme court of Michigan that construction must, in this case, be controlling with us. And we think the meaning and effect of the statute has been declared by that court in the case of *Hutchins v. Kimmell* (31 Mich., 126), a case decided on the 13th of January, 1875. * * * The decision of the Michigan supreme court had not been made when this case was tried in the court below. Had it been, it would doubtless have been followed by the learned and careful circuit judge.

The Supreme Court of the United States in this case reached the conclusion that the same construction should be placed upon the statutes of Michigan as was placed upon the same by the State court, yet it did not in fact construe said statutes but accepted the construction of the State court. It will be observed that the Supreme Court of the United States said that they must be controlled in this case by the construction of the statute by the supreme court of Michigan. According to this decision, the construction of a State statute regulating marriages by a State court will be accepted by the Supreme Court of the United States. The construction of the statute of Virginia on this subject in the case of *Offield v. Davis* would, therefore, no doubt be accepted by the Supreme Court of the United States as the law of that State.

The Department finds no error in the action of the Bureau rejecting this claim, and the same is hereby affirmed.

In so far as the decision in the case of *Elizabeth Monroe* (3 P. D., o. s., 282) intimates that a common-law marriage is valid in Virginia, said decision is hereby overruled.

**MEDICAL EXAMINATIONS—COMMISSIONER OF PENSIONS—ORDER 74—
NEW EXAMINATIONS.****OLIVER S. WHITEHURST.**

The rate of pension now received by the claimant (\$8) appears proportionate to the degree of inability shown for earning a support by manual labor.

Some discretion as to the frequency and propriety of ordering medical examinations of claimants is properly vested in the Commissioner of Pensions as prescribed by order No. 74, approved October 21, 1903.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 18, 1904.*

The appellant, Oliver S. Whitehurst, formerly a private in Company D, Sixth Tennessee Volunteer Cavalry, is now, and has been since July 24, 1890, in receipt of a pension of \$8 per month, under the act of June 27, 1890, on account of disease of the respiratory organs.

July 26, 1894, the claim was considered and approved for dropping the claimant's name from the roll on the ground that he was not ratably disabled under said act.

Prior to the date of this action the claimant had three times been ordered before a board of examining surgeons to determine his right to said rate, but each time he failed to appear.

Later, the order for dropping was (for some reason not clearly shown) vacated and he was continued on the roll at the same rate.

On May 9, 1901, he filed an application for increase, alleging increased disability from disease of respiratory organs and resulting "lung trouble."

Before this claim was adjudicated, and about two months after he was medically examined thereunder, he filed, April 2, 1902, a second claim for increase, alleging catarrh of the head and debility from age as additional disabling causes.

Both claims were adjudicated together June 4, 1902, and rejected.

From that action an appeal was entered December 12, 1902, contending that an injustice had been done the claimant by not giving him the benefit of a separate medical examination under the second application.

The claimant was medically examined January 15, 1902, under the prior application, by a board of surgeons, whose certificate shows the following:

Age, 61 years; height, 5 feet 9 inches; weight, 127 pounds.

Pulse rate, 86, 90, 120; respiration, 20, 20, 26; temperature, 98.8.

Chest measures at rest 34 inches; expiration, 33½; inspiration, 35½ inches.

Heart: Apex impulse 2 inches below and 2 inches to right of left nipple, evident to inspection and palpation. Position and area of dullness normal; rhythm, action, and sounds normal; no murmurs; on dilatation or hypertrophy; no dyspnoea except on exercise; no œdema or cyanosis.

Urine clear straw color; acid reaction; sp. gr., 1.023; no sugar; no albumin.

Chronic bronchitis: Moist and dry rales, cough, expectoration, and dyspnea on exercise.

Catarrh of head: Nasal catarrh; mucous membrane of anterior and posterior nares hypertrophied; mucus secretion abundant; no ulcerations; pharynx not involved; hearing unimpaired; Eustachian tubes pervious. The bronchial and nasal catarrh could be due to measles, as stated by claimant.

No other disease of respiratory organs. General debility: Claimant seems to be well nourished, and while underweight, his muscles are firm and hard. No impairment of digestion or mental faculties claimed.

We find that the aggregate permanent disability for earning a support by manual labor is due to chronic bronchitis and nasal catarrh, not due to vicious habits, and warrants a rate of \$6.

The foregoing certificate is not inconsistent with the reports of prior examinations on file. No other medical evidence appears in support of the claim.

According to the report of the examining surgeons (above quoted) this claimant was at that time in pretty good physical condition and is (and was then) receiving \$2 per month more pension than the examining surgeons recommended.

The action of the Bureau in refusing an increase on this evidence appears to have been perfectly proper.

The attorneys in the case contend that the Bureau erred in not giving the claimant a separate medical examination under the second application for increase and cite the case of Alfred Carpenter (11 P. D., 429) as authority.

The Department knows of no rule or law under which the claimant can demand as a legal right a second medical examination while a similar claim is pending.

The case cited by the appeal does not appear to be in point. That case (11 P. D., 429) discusses what may be considered separate and distinct claims rather than the claimant's right to frequent medical examinations.

Prior to October 3, 1903, there appears to have been no well-defined rule of practice regulating the number or frequency of medical examinations that a claimant might have under applications for increase. Heretofore this has been a matter largely within the discretion of the Commissioner of Pensions. While the Department does not appear to have passed squarely upon this question, there are cases that sanction such discretionary power.

In a "fee" case, where this claimant's attorneys (J. B. Cralle & Co.) were appellants (5 P. D., 84), the Department used the following language:

Some discretion as to the propriety and time of ordering medical examinations for claimants must be vested in the Commissioner of Pensions.

This apparent defect or omission in the rules of practice appears to have been supplied by sections 1 and 4 of Order No. 74, approved by the Secretary of the Interior October 21, 1903, and read as follows:

1. All applications for increase of pension will be taken up for consideration and action at the earliest practicable date after their receipt in the Bureau and orders for medical examinations issued at once, unless, from the nature of the disability in any particular claim and the history of the case as shown by previous medical examinations, a reasonable presumption obtains that there has been no material increase in pensioner's disability since the date of his last examination. In such case the pensioner will be advised that the propriety of at once ordering a medical examination will be considered if he shall furnish competent medical evidence showing definitely his physical condition from all causes for which he is pensioned, if under the general law; or showing the extent to which he is incapacitated for earning his support by manual labor from all causes combined, if under the act of June 27, 1890; and not otherwise.

4. If an application for increase shall be filed before a prior application for increase has been disposed of, but subsequent to the medical examination held thereunder, an order for a medical examination will not be issued without medical testimony, as in Rule 1, and pensioner will be so advised.

The principle enunciated by the foregoing order appears to have obtained in regard to medical examinations under similar circumstances prior to the date of its issue.

In the case at bar the Department fails to see how the application of said rule can work any hardship to the claimant in this instance. The medical examination made under the prior claim does not show the existence of any ailment that would be likely to suddenly increase in severity or assume an acute form, and in the absence of evidence to the contrary (or of some new disability) it is a reasonable presumption that a second examination, in close proximity to the first, would not result in any benefit to the claimant.

Inasmuch as claimants are at liberty to file applications for increase as often as they elect to do so, it is obvious that some restrictions should be placed on the number or frequency of medical examinations; otherwise, much needless and unnecessary expense would be incurred without any substantial benefit to the claimants themselves.

The action appealed from is affirmed.

RESTORATION—ACT MARCH 3, 1901—DIVORCE.

ELLEN A. MOER (WIDOW).

Claimant was dropped from the roll on account of her remarriage; and she was thereafter divorced from her second husband upon his own petition, the record showing competent jurisdiction. There are no indicia of fraud on the part of either party to the decree tending to show an attempt to defraud the Government.

Held: Claimant has no status under the act of March 3, 1901.

The fact that claimant's divorced husband died prior to the filing of the claim for restoration does not give her title under the act of March 3, 1901.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
April 30, 1904.*

Ellen A., once a widow of Samuel H. Moer, formerly a captain and assistant quartermaster in United States Army, filed her application for restoration and renewal under the act of March 3, 1901, claim being rejected October 27, 1903—application filed July 30, 1903—on the ground that she was divorced from her last husband, Steele, on his application. An appeal was filed December 29, 1903.

This appeal sets up two errors in law: First, that the divorce decree is void upon its face; and second, that if the divorce is valid its practical effect is to restore her to the status of the widow of Moer.

The following is a copy of the transcript in divorce proceedings referred to:

In district court, September term, 1884. Alonzo Steele, plaintiff, v. Ellen A. Steele, defendant. Petition in equity.

STATE OF IOWA, *Poweshiek County*, ss:

The plaintiff states:

That the plaintiff and the defendant were married to each other on the 6th day of June, A. D. 1870, at Grinnell, Iowa.

That from the said date of marriage until the present time the plaintiff has been a bona fide resident of the town of Grinnell, Poweshiek County, Iowa, and that such residence has not been for the purpose of obtaining a divorce only; and this application is made in good faith and for the purpose set forth in this petition.

That the plaintiff and defendant lived together as husband and wife until the 16th day of June, A. D. 1874. That on or about the 16th day of June, 1874, the defendant willfully and without reasonable cause deserted the plaintiff and has absented herself without reasonable cause for the space of more than two years; that at the time the defendant deserted the plaintiff she declared her purpose never to return or live with the plaintiff; that she immediately left the State of Iowa and resided, as the plaintiff is informed and believes, in the State of Michigan for one year or more; that she then removed, as the plaintiff is informed and believes, to Mills County in the State of Iowa, where she resided for one or more years; that she then removed to Poweshiek County, Iowa, and to the town of Grinnell where she has resided in a house of her own, separate and apart from the plaintiff, for six years or more as the plaintiff is informed and believes.

That the plaintiff from the time of the said marriage and so long as the defendant continued to live with him as a wife conducted himself in a kind and considerate manner, and discharged faithfully the duties of a husband.

That no children were born to the plaintiff and defendant as the fruit of said marriage.

Wherefore the plaintiff prays that the bonds of matrimony heretofore and now existing between the plaintiff and defendant may be dissolved, and that a decree of this court may be entered divorcing the plaintiff and restoring the plaintiff to all the rights and privileges of an unmarried man, and for such other and further relief as may be equitable in the premises.

HAINES & LYMAN,
Attorneys for plaintiff.

STATE OF IOWA, *Poweshiek County*, ss:

I, Alonzo Steele, being first duly sworn, on oath depose and say that I am the plaintiff in the above-entitled action; that I have read the foregoing petition and

know the contents thereof, and that the allegations therein contained are true, as I verily believe.

ALONZO STEELE.

Sworn to before me and subscribed in my presence by Alonzo Steele this 5th day of September, 1884.

[SEAL.]

R. M. HAINES, *Notary Public*.

In the district court of the State of Iowa, in and for Poweshiek County, September term, A. D. 1884. Alonzo Steele, plaintiff, v. Ellen A. Steele, defendant. Original notice.

To said defendant, Ellen A. Steele:

You are hereby notified that on or before the 11th day of September, A. D. 1884, there will be on file in the office of the clerk of the district court of Poweshiek County, Iowa, the petition of the plaintiff aforesaid, praying for a divorce from the bonds of matrimony existing between you and the plaintiff on the ground that you have willfully deserted him and have absented yourself without reasonable cause for the space of two years.

You are also notified that unless you appear thereto and defend, before noon of the second day of the September term of said district court of Poweshiek County, commencing on the 22d day of September, A. D. 1884, a default will be entered against you and judgment rendered thereon and decree entered as prayed in said petition.

HAINES & LYMAN,

Attorneys for Plaintiff.

STATE OF IOWA, *Poweshiek County, ss:*

I, Henry Hill, on oath state that the within notice came into my hands for service on the 6th day of September, 1884, and on the same day I served the same personally upon the within-named defendant, Ellen A. Steele, by reading the same to her and delivering to her a true copy of the same at Grinnell, Poweshiek County, Iowa.

HENRY HILL.

Subscribed in my presence and sworn to before me by Henry Hill this 6th day of September, 1884.

[SEAL.]

R. M. HAINES, *Notary Public*.

FIFTH DAY.

THURSDAY, *September 26, A. D. 1884.*

Now, on this day, to wit, September 26, 1884, the same being the fifth day of the said term of said court, court opened by proclamation to the sheriff, pursuant to adjournment; present, same officers as on yesterday. The following among other proceedings were had, done, and entered of record, to wit:

In district court. September term 1884. Alonzo Steele v. Ellen A. Steele. Decree.

STATE OF IOWA, *Poweshiek County, ss:*

Be it remembered that on this day, to wit, the 26th day of September, 1884, the same being the fifth day of said term of said court, this cause came on for hearing. The plaintiff appeared by Haines & Lyman, his attorneys, and the defendant failed to appear either in person or by attorney. The court having inspected the original notice on file and the proof of service thereon, finds due, legal, and timely service of notice has been made upon the defendant by personal service within this county, and the defendant having been three times solemnly called in open court and making no appearance, is by the court adjudged to be in default. The court having inspected the petition and having heard the evidence offered by the plaintiff and the argument of counsel, and being well and fully advised in the premises, finds that all the matters and things alleged in the plaintiff's petition are true; that the plaintiff is and has been for many years a bona fide resident of the town of Grinnell,

Poweshick County, Iowa; that the defendant did willfully desert her husband, the plaintiff herein, and did willfully absent herself without reasonable cause for the space of more than two years prior to the commencement of this action, and that the plaintiff is entitled to a divorce from the bonds of matrimony.

It is therefore considered, ordered, adjudged, and decreed by the court that the bonds of matrimony heretofore existing between the plaintiff, Alonzo Steele, and the defendant, Ellen A. Steele, be, and the same are hereby, forever dissolved, and the plaintiff is hereby restored to all the rights and privileges of an unmarried man. And it is further ordered, adjudged, and decreed by the court that all the rights and privileges of the defendant, Ellen A. Steele, which she may have had as wife of the plaintiff, are forever barred. And it is further ordered that the plaintiff pay the costs of this action, taxed at \$8.65, and that in default of payment execution issue therefor.

J. K. JOHNSON, *Judge*.

The appealing attorney, in attacking this divorce decree, does not deny the jurisdiction of the court, but claims that the facts in the case did not warrant the decree as pronounced by the court. This Department, however, is not the forum in which to attack a decree of divorce upon the ground that the facts in the case did not warrant the judgment pronounced. This point was settled in the opinion in the case of the widow of Rumsey (14 P. D., 290), in which it was held that the Department will not question the validity of a decree of divorce, upon a question of fact, provided there were no indicia of fraud on the part of either party tending to show an attempt to defraud the Government.

The petition of this claimant's former husband is in proper form and sets out statutory grounds for divorce. Summons was regularly issued out of the court, and the record shows actual personal service upon the claimant. The cause was regularly heard, and the court upon due consideration dissolved the bonds of matrimony existing between this claimant and her husband, Steele, upon the petition of said husband. There is not the slightest shadow of fraud shown upon the record for the purpose of defrauding the Government—or, as to that matter, for the purpose of defrauding anyone—and this decree will be held conclusive and binding.

The attorney again contends that even if this decree is binding, the fact that this divorced husband, Steele, having died before claimant filed her application for restoration and renewal, she is therefore entitled under the act of March 3, 1901. That portion of the act in question which has to do with the issue involved is as follows:

Provided, however, That any widow who was the lawful wife of any officer or enlisted man in the Army, Navy, or Marine Corps of the United States during the period of his service in any war, and whose name was placed, or shall hereafter be placed, on the pension roll because of her husband's death as the result of wound or injury received or disease contracted in such military or naval service, and whose name has been, or shall hereafter be, dropped from said pension roll by reason of her marriage to another person who has since died or shall hereafter die, or from whom she has been heretofore or shall be hereafter divorced, upon her own application and without fault on her part, and if she is without other means of support than

her daily labor as defined by the acts of June twenty-seventh, eighteen hundred and ninety, and May ninth, nineteen hundred, shall be entitled to have her name again placed on the pension roll at the rate now provided for widows * * *.

To state the attorney's proposition is but to demonstrate its speciousness and unsoundness, and to explode it. It matters not whether this husband who was divorced from claimant upon his own petition is alive or dead. She destroyed her pensionable status as the widow of Moer when she married Steele, and she lost her right to restoration under the act of March 3, 1901, when she was divorced from her second husband upon said husband's petition.

The acceptance of the attorney's contention as a sound and logical sequence of the terms of the act in question would absolutely defeat its intent and clearly reduce its terms to an absurdity.

This claimant having been dropped from the pension roll because of her remarriage, and she, having been divorced from her second husband on her said husband's petition, and the record of the court granting the decree showing all necessary jurisdiction and jurisdictional facts, claimant has no right to restoration under the act of March 3, 1901.

Action affirmed.

MARRIAGE IN MASSACHUSETTS—COHABITATION AND REPUTE—EVIDENCE.

MARY E. DRAPER (WIDOW).

1. A common-law marriage, i. e., a contract per verba de præsenti, no third party participating as a magistrate or minister, or one believed to be such by the parties, neither of whom is a Quaker, is not a valid marriage in Massachusetts. (Overruling case of Emma C. Sanders, 11 P. D., 114.)
2. General repute or cohabitation of the parties as married persons is evidence by which a marriage, validly contracted, may be proved.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, April 30, 1904.

Herewith are returned papers in the case of Mary E. Draper, widow of Daniel H. Draper, Companies G and D, Twentieth Massachusetts Volunteer Infantry, who appealed on November 11, 1902, from your actions of July 3, 1896, whereby you rejected her claim for pension under the general law (filed March 6, 1888), and her claim under the act of June 27, 1890 (filed March 23, 1892), on the ground that she is unable to show that she was ever married to said soldier by a ceremony, "or that she is his legal widow."

Daniel H. Draper was first married to one Harriet Bickford, who, on May 22, 1868, obtained a divorce from the soldier. The appellant maintains that she and soldier were married in Boston, Mass., on July 21, 1871, by the Rev. George Clark, a Methodist minister. No record of this marriage or of the issue of a license therefor has been

found. Moreover, a special examiner reports that a search of city directories fails to show that any clergyman of that name lived in Boston in 1871 or for several years prior or subsequent thereto. There are no witnesses who testify to the fact of the marriage. Indeed, appellant states that there was no one present except the minister, his wife, and his housekeeper. She also states that she is now satisfied that her alleged husband did not procure a license, her conclusion in this respect being based upon her inability to find the same of record. She declares, however, that the man who performed the ceremony appeared to be a minister. In any event, it is beyond dispute that she and Draper lived together as man and wife from the time of the alleged marriage until his death on September 27, 1887; that they held themselves out as husband and wife; that he introduced her as his wife to his mother and to his brothers, by whom and by others they were regarded as regularly married. During these sixteen years of cohabitation the parties resided in Massachusetts, with the exception of a few months' residence in New Hampshire.

It is maintained on the part of the Bureau, in the brief of the chief of the law division, that what is known as a common-law marriage is not a lawful marriage in either Massachusetts or New Hampshire.

It is unnecessary at this time to pass upon the law of New Hampshire in this connection. The status of the appellant must be settled by the law of Massachusetts, where the reputed marriage took place, where the parties lived, and where the soldier died, broken in health, a charge upon the earning resources of the appellant.

Attorney for appellant assigns as error your refusal to recognize her as the widow, your holding that the evidence fails to show a ceremonial marriage, and your holding that even in the absence of a ceremonial marriage, under the laws of Massachusetts, appellant is in law the widow of the soldier.

Waiving for the time being the question as to whether a ceremonial marriage was performed, it is contended, in effect, that a contract of marriage *per verba de presenti*—a "common-law marriage"—is valid in Massachusetts.

The decisions of Massachusetts courts have been carefully examined to ascertain the law of the place upon this point. The earliest decision appears to be that of *Mangue v. Mangue* (1 Mass., 240), decided in 1804. This was a libel for divorce. The evidence of the marriage sought to be dissolved was a certificate of a justice of the peace to the effect that the parties went before him and made an agreement to take one another as husband and wife. No ceremony was performed by the magistrate. The court held that the justice did not act officially; that he did not marry them, but "was merely a private witness of the transaction," which amounted simply to a civil contract, but not a marriage, although the parties cohabited under said contract and considered themselves married.

The question first received an exhaustive treatment in the case of *Milford v. Worcester* (7 Mass., 48), which is still a leading case upon the subject, although decided as far back as 1810. The town of Milford brought an action of assumpsit against the town of Worcester for the support and relief of Stephen Temple, Rhoda Temple (his alleged wife), and their children. It was conceded that Stephen Temple had a settlement in Worcester. Under the law, if Rhoda was his lawful wife the town of Worcester would also be holden for the support of her and the children. The evidence of the alleged marriage was a certificate of a town clerk to the effect that his official records showed the entry of an intention of marriage between said Stephen and Rhoda, under date of July 6, 1784, and the testimony of Rhoda and others that in 1784 Stephen and she came together to a tavern, when a justice of the peace happened to be there, and, producing their certificate, they asked him to marry them, which he refused to do; whereupon, in the presence of the magistrate and of others, Stephen declared that he took Rhoda for his wife, and she declared that she took him for her husband. According to some testimony they were encouraged to do this by the magistrate, who, however, denied that he gave any official sanction to the proceedings. This was the beginning of their cohabitation. Upon the effect of that performance the validity of their marriage turned. It was urged by counsel that this was a marriage *de facto*; that a contract in *præsentis* amounts to an actual marriage; that while it did not answer the requirements of the statutes, the statutes did not actually declare such a marriage void.

The court, however, held against counsel on all points. The opinion was rendered by the famous chief justice, Theophilus Parsons. The following are pertinent excerpts from the opinion, following a history of legislation on the subject of marriage, showing what stringent safeguards had ever been thrown about that institution so as to avoid an irregular marriage, from the earliest colonial period of that State:

No form of words is established for the solemnization of a marriage. * * * But the statute would be substantially conformed to if the parties were to make the mutual engagement in the presence of the justice or minister, with his assent, he undertaking to act on that occasion in his official character. But without such assent and undertaking of the justice or minister, notwithstanding their personal presence, the marriage, I am well satisfied, will not be solemnized pursuant to, nor be a lawful marriage within, the statute.

* * * * *

But it has been argued that this marriage, although not solemnized pursuant to the statute, is yet a lawful marriage had between parties competent to contract marriage, and not declared void by any statute.

This ground for supporting the marriage deserves consideration, as, if it be tenable, the consequences are very extensive. Where the laws of any State have prescribed no regulations for the celebration of marriages, a mutual engagement to intermarry, by parties competent to make such contract, would in a moral view be a good marriage, and would impugn no law of the State. But when civil government has established regulations for the due celebration of marriages, it is the duty, as well as

the interest, of all the citizens to conform to such regulations. A deviation from them may tend to introduce fraud and surprise in the contract; or by a celebration without witnesses, the vilest seduction may be practiced under the pretext of matrimony. When, therefore, the statute enacts that no person but a justice or a minister shall solemnize a marriage, and that only in certain cases, the parties are themselves prohibited from solemnizing their own marriage by any form of engagement, or in the presence of any witnesses whatever. If this be not a reasonable inference, fruitless are all precautions of the legislature.

* * * * *

It has been fully observed by the counsel for the plaintiffs that a marriage engagement of this kind is not declared void by any statute. But we can not thence conclude that it is recognized as valid, unless we render in a great measure nugatory all the statute regulations on this subject.

It may be objected to these principles that, if they are correct, a marriage among Quakers, agreeably to the rules of their society, is void. I know not that the conclusion would not be just. I know that such was the opinion of lawyers before the Revolution, and so general was this impression that to guard those people from consequences so mischievous, in the eighth section of the revising statute of 1786, c. 3, all such marriages before had were confirmed and such marriages authorized in future. * * *

No person can lawfully solemnize such marriages but a justice of the peace or an ordained minister. And a record of a marriage so solemnized by either of those officers, founded on a certificate duly made, is legal evidence of the marriage, and no inquiry is further made as to the publication of banns, the assent of parents or guardians, or the inhabitaney of the parties. When, therefore, the marriage appears to have been celebrated by a competent officer, as a justice or a minister, the marriage is deemed lawful, although the officer, for his irregularity, may have incurred the penalty of fifty pounds. But a marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized. The woman, when a widow, can not claim dower, nor the issue seizin by descent.

* * * * *

Upon the whole, it is the opinion of the court that the mutual engagement of the parties in this case, to take each other for husband and wife, in the room where a justice was present, he not assenting, but refusing to solemnize the marriage, is not a lawful marriage.

In 1854 the case of *Parton v. Hervey* (67 Mass., 119) was decided. This was a petition for a writ of habeas corpus brought by T. J. Parton in behalf of Sarah Parton, alleged to be his lawful wife, who was unlawfully detained, etc., by Susan Hervey, her mother. The answer was that Sarah was only 13 years old and that through fraud, without the knowledge or consent of parents, petitioner had clandestinely married said Sarah, she being under age. According to a Massachusetts statute ministers and magistrates were prohibited from marrying a male under 21 or a female under 18 without the consent of the parents or guardians. The court held that this was directory, and then passed upon the question of age of consent, holding that, as at common law, a child reached that age when 12 years old. The court said:

But it is urged that this rule of law (i. e., age of consent) is not in force in this Commonwealth, because by our statutes ministers of the gospel and magistrates

have always been prohibited, under a heavy penalty, from solemnizing marriages of males under 21 years of age or females under 18 years of age without the consent of their parents or guardians (citing statutes).

But the effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But in the absence of any provision declaring marriages not celebrated in a prescribed manner or between parties of certain ages absolutely void, it is held that all marriages regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute. (2 Kent Com., 90, 91; 2 Greenl. Evid., par. 460; *Milford v. Worcester*, 7 Mass., 48; *Londonderry v. Chester*, 2 N. H., 268; *Hantz v. Sealey*, 6 Binn., 405.) And such is the effect given to similar statutes in England. (*The King v. Birmingham*, 8 B. & C., 29; *Catterall v. Sweetman*, 1 Robertson, 304.) In the language of Parsons, C. J., "when a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without the consent of parents or guardians, such marriages would unquestionably be lawful, although the officer would incur the penalty for a breach of his duty." (7 Mass., 54, 55.)

This case was cited in the departmental decision in the case of *Emma C. Sanders* (11 P. D., 114), as in effect substantially overruling the decision in *Milford v. Worcester*. This point was considered in a recent Massachusetts case, *Commonwealth v. Munson*, post, and it will be the subject of further consideration in this decision.

Parton v. Hervey was also regarded as casting some doubt as to *Milford v. Worcester* being the present law in Massachusetts, in the case of *Meister v. Moore* (96 U. S., 78). *Meister v. Moore*, however, was decided in 1877—two years before the decision in *Commonwealth v. Munson* was rendered. There can be no question, if the Supreme Court could have seen the comments of Chief Justice Gray in the latter case as to the significance of *Parton v. Hervey* in this connection, that its conclusion as to the present law in Massachusetts would have been different.

In *Loring v. Thorndike* (5 Allen, 257), decided in 1862, the court passed upon the validity of a marriage which took place in the city of Frankfort on the Main. It was held:

The civil act of the free city of Frankfort on the Main, requiring marriages to be solemnized in a particular form, does not apply to foreigners temporarily residing there; but a marriage in that city, before the United States consul, between a citizen of Massachusetts and a woman not domiciled there is valid.

The marriage in question did not conform in detail to the laws of Frankfort. But there was a ceremony in form and manner which the parties were advised and believed to be valid—a form which all non-residents of that city were accustomed to adopt to effect a legal matrimonial contract. It was argued by counsel that in any event there was a contract per verba in praesenti followed by cohabitation, which amounted to a valid marriage. But the court declined to pass upon this question, having concluded that the marriage in the form in which it took place was valid in Frankfort and therefore valid else-

where. Nothing can be argued from the refusal of the court to pass upon the question of common-law marriages.

In 1872, Chapman, C. J., delivered the opinion in *Meyers v. Pope* (110 Mass., 314). This was an action of tort for the seduction of plaintiff's wife. Defendant denied validity of the marriage between Meyers and his wife. In proof of said marriage, it was shown that Meyers and his wife went before a justice of the peace with the intention of being married. Meyers stated before the justice that the woman was his wife, and the parties thereafter cohabited in the belief that they were husband and wife. The justice testified that "he did not understand that he married the parties at that time." The court below held that this was not evidence sufficient to warrant the finding of a marriage, and directed a verdict for defendant. Plaintiff excepted to this ruling, and on appeal the exceptions were sustained. While the decision bears principally upon the effect of the Statutes of 1840, c. 84, and 1841, c. 20, hereafter to be considered, some of the remarks of the court are germane to the present inquiry. The court held that the evidence should have been submitted to the jury.

If the jury should believe that the plaintiff's memory and statements were the more accurate (i. e., than the justice's), they might find upon the evidence that there was a marriage in conformity with our statutes; for no form of words is necessary for the solemnization of a marriage. It is sufficient if the parties contract before a justice of the peace or minister, and he assents to the proceeding acting in his official character. (*Milford v. Worcester*, 7 Mass., 48, 54.) In that case it was held to be necessary for the magistrate or minister to act officially in order to constitute a valid marriage under our statutes. But since the time of that decision the legislature has made further provisions to save marriages which parties have contracted in good faith, in the belief that they were in conformity with the statutes, and followed by cohabitation, from being regarded as illegal. A marriage may be valid though the minister or magistrate is prohibited under a heavy penalty from celebrating it; and by the Rev. Stats., c. 75, par. 24, and the Gen. Sts., c. 106, par. 20, a marriage is not to be "deemed or adjudged void, nor shall the validity be in any way affected by want of jurisdiction or authority in such person, or by an omission or informality in the manner of entering the intention of marriage, if the marriage is in other respects lawful, and is consummated with a full belief that they have been lawfully joined in marriage." This includes a marriage where the person celebrating it did not intend to act officially and knows he could not do so.

The policy of the law, as thus expressed, is strongly opposed to regarding a marriage, entered into in good faith, believed by one or both parties to be legal, and followed by cohabitation, as void. A liberal construction of the statute authorizes us to construe it as including a case where the parties go before a magistrate or minister, make a marriage contract in some form in his presence, in the belief that he sanctions and assents to it in his official capacity, and cohabit as husband and wife afterwards, believing that they were legally married, though the magistrate understands the matter differently and does not intend to act officially in the matter. The misunderstanding between the parties and the magistrate may be regarded as an informality not rendering the marriage void.

It will be noticed that this decision, liberal as it is in its tendencies, is predicated upon the fact that the parties went before a magistrate or minister. In no way does it sanction the idea that parties can

marry themselves or that there can be a valid marriage without the intervention of a magistrate or minister, acting officially, but perhaps informally and irregularly. The decision in *Mangue v. Mangue*, supra, is in view of this decision, untenable now; not, however, because the trend of judicial determination has been away from the position of the Massachusetts court in 1804, but on account of legislation—legislation necessarily had in view of the declaration as to what was the law in *Milford v. Worcester*.

The fact that the general court found it necessary to legislate in this direction, is of itself an indication that common-law marriages were invalid in Massachusetts. And the legislation in no way authorizes a marriage without the intervention of a minister or magistrate, or of a person believed to be such by the contracting parties.

Two years later, in 1874, the court decided the case of *Thompson v. Thompson* (114 Mass., 566). In this case the libellee had been married before his attempted marriage to libellant. His wife had obtained a divorce from him, for his fault. Under the law he could not remarry without obtaining leave of court. On November 21, 1867, he applied for leave of court, which was granted him on February 18, 1868. But on said November 21, 1867, he married, ceremonially, the libellant. They lived together as husband and wife, not only up to the time when leave of court was obtained, but thereafter, continually, until about January 1, 1873, both believing themselves to be lawfully married, and with the understanding that "by such subsequent cohabitation (i. e., as leave was granted) they became, and were lawfully, husband and wife." About January 1, 1873, she was advised that the marriage was void. Hence this libel. The court held:

To constitute a valid marriage by the law of the Commonwealth, it must be solemnized between parties competent to contract it, and (except in the case of Quakers) before a person being or professing to be a justice of the peace or minister of the gospel. (*Milford v. Worcester*, 7 Mass., 48.)

* * * * *

The case as stated in the report shows that such new solemnization (i. e., after leave of court to remarry was obtained) was not proved to the satisfaction of the presiding judge as a matter of fact, and does not require it to be presumed as matter of law.

Finally, in 1879, the whole question was elaborately considered in *Commonwealth v. Munson* (127 Mass., 459). This was an indictment for lewd and lascivious cohabitation of respondent with one Martha Eaton. The defense was that the parties were married. It appeared that at a public religious meeting called by the defendant and held in an Advent chapel in Worcester in July, 1879, at which about fifty persons, but no magistrate or minister of the gospel, were present, the defendant himself occupied the pulpit, gave out a text, talked

about repentance, read from St. Matthew, and then walked down the aisle where said Eaton met him. They joined hands, and he said:

In the presence of God and of these witnesses, I now take this woman whom I hold by the right hand to be my lawful wedded wife, to love and to cherish, till the coming of our Lord Jesus Christ, or till death do us part.

The woman more particularly specified that she took him for her husband and to love, reverence, and obey him "until the Lord himself shall descend from heaven with a shout and the voice of the archangel and with the trump of God, or till death shall us sever." Prayer followed. There was no other marriage ceremony. Neither party was a Quaker, and the service was not conformable to the usage of any religious sect. The parties were of full age and believed the ceremony to constitute a lawful marriage. They cohabited under that belief. The court below ruled that this was not a marriage, and the jury found defendant guilty. The question as to the validity of this marriage was sent up to the Supreme Court. Chief Justice Gray wrote the opinion.

In Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the colony, province, and Commonwealth; the canon law was never adopted, and it was never received here as common law that parties could by their own contract, without the presence of an officiating clergyman or magistrate, take each other as husband and wife and so marry themselves. (*Milford v. Worcester*, 7 Mass., 48, 53, etc.) This clearly appears on tracing the history of the legislation upon the subject, the whole of which, whether repealed or unrepealed, is by a familiar rule to be considered in ascertaining the intention of the legislature.

The court then reviewed the entire history of legislation upon this point from the earliest times in Massachusetts, followed by a consideration of the decision in *Milford v. Worcester*, which the court accepted as the proper exposition of the law.

Under all changes in the form of the statutes it has always been assumed in this Commonwealth and in the State of Maine, which was originally a part thereof, that (except in the single case of Quakers or Friends, whose marriages are made valid by a special provision limited to that sect, and, though not solemnized by any magistrate or minister, are witnessed, recorded, and returned by the principal officers of the meeting at which the ceremony is performed) a marriage which is shown not to have been solemnized before any third person, acting or believed by either of the parties to be acting as a magistrate or minister, is not lawful or valid for any purpose. (Cites several cases.)

The court then commented upon the case of *Parton v. Hervey*, *supra*, saying:

The general statement of Mr. Justice Bigelow in the course of his discussion on this point, that "in the absence of any provision declaring marriages, not celebrated in the prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages, regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute," evidently had regard to the effect of specific regulations or to the publication

of banns or the consent of parents, and not to the broader question, which was before him, whether any presence of a third person was necessary. If the learned judge had intended to cast any doubt on the adjudication of that question in *Milford v. Worcester*, he would hardly have referred, as he did, to that case as supporting his statement.

The court then referred to *Meyers v. Pope*, *supra*, saying that "the extent of that decision" was that that statutory provision so far modifying the law as declared in *Milford v. Worcester* as to make a marriage before a justice or minister believed by either party to be authorized as valid as if he were in fact authorized to solemnize the marriage, should by liberal construction be held to include such a case as was presented by the facts in *Meyers v. Pope*.

Continuing, the court held:

Whether it is wise and expedient so to change the law of Massachusetts as to allow an act, which so deeply affects the relation and the rights of the contracting parties and their offspring, to become binding in law by the mere private contract of the parties, without going before any one as a magistrate or minister, is a matter for legislative and not for judicial consideration.

In the case before us, it appearing from the undisputed facts that in the ceremony performed by the defendant and the woman with whom he has since cohabited, no third person participated and was understood or expected to participate in any way, and no civil magistrate or minister of the gospel, nor any person believed to be such, was present, and neither party was a Friend or Quaker, it was rightly ruled in the superior court that no lawful or valid marriage between the parties had taken place.

Summarized, the gist of this decision, which is the law of the Commonwealth of Massachusetts, is tersely stated in the syllabus:

A ceremony performed by a man and woman in good faith as a marriage, no third party participating, and no magistrate or minister, nor any person believed to be such being present, and neither party being a Friend or Quaker, does not constitute a valid marriage under the law of this Commonwealth.

This is the last pronouncement by a Massachusetts court upon the question. A common-law marriage, or what is commonly understood by that term, is therefore not a valid marriage in Massachusetts. The doctrine laid down in *Milford v. Worcester* is still the law in that Commonwealth, except where changed, in some instances, by statutory enactment. The case of *Emma C. Sanders* (11 P. D., 114), so far as it holds the contrary, is hereby overruled.

It is clear that if appellant's marriage rested upon merely an agreement between the parties, without a ceremony before some magistrate or minister, or a person believed by them to be such, there could be no marriage, and she would be without the pensionable status as soldier's widow. To the extent that your action was predicated upon the validity of a common-law marriage in Massachusetts, we find no error.

But her status does not rest upon this alone. Had she not alleged a ceremony, the facts that she and soldier cohabited, held themselves out to be man and wife, and were generally reputed so to be, could not be taken as proof of marriage. But she alleged that a marriage,

consonant with the law of the State, actually took place. On this point her own testimony is competent.

A marriage may be proved by the testimony of either of the contracting parties. *Commonwealth v. Hayden* (1895), 163 Mass., 453.

She is not bound to prove her marriage by primary evidence. Such proof is not required in Massachusetts and is not required here. Circumstantial or secondary evidence to prove a marriage has been competent in Massachusetts since 1840, when a statute was passed which, to-day, is as follows:

Marriage may be proved by evidence of an admission thereof by an adverse party, by evidence of general repute, or by cohabitation of the parties as married persons, or of any other fact from which the fact may be inferred. (R. L., Mass., ch. 151, s. 39.)

Numerous decisions bearing upon this statute have been rendered by Massachusetts courts. In 1860, in *Commonwealth v. Harley* (14 Gray, 411), an indictment for maintaining a nuisance, evidence was admitted to show that respondent's reputed wife made sales of liquor on the premises occupied by her husband. To show that they were married the State proved that she had been seen occupying the same bed with defendant, and that she had been seen getting dinner, and doing other household duties. The court said:

Cohabitation and the conduct of the parties is, in all cases, admissible in evidence in proof of marriage.

In 1865, in *Commonwealth v. Johnson* (10 Allen, 196), an indictment for bigamy, evidence was offered to show that respondent was reputed to have been married. This was held to be competent as evidence of a marriage.

It is evidence of a marriage—that is, of a marriage entered into agreeably with Massachusetts law.

So, in this case, there is evidence that appellant and soldier cohabited, that they were reputed to be husband and wife, and that they mutually held themselves out to the world as married persons. All this is competent evidence that they were duly married. Circumstantially, it is in corroboration of her averment. Upon the question of fact you erred. On appeal it is found as fact that Draper and the appellant were married validly in Massachusetts in 1871. The fact that no license was obtained, or that record thereof can not be found, is immaterial, as is also the fact that no such minister as the Rev. George Clark has been found. If these parties honestly believed that the man who performed the ceremony was a minister, and there is no evidence from which the contrary can be inferred, the marriage was valid.

No question can be raised as to Draper's capacity to contract marriage in 1871. It is true that he was then the divorced husband of

Harriet, and that he had not obtained leave of court to remarry, according to the provisions of section 26, chapter 107, of the general statutes of Massachusetts, then in force:

When a divorce from the bond of matrimony, except for the cause of adultery, has been granted under the laws of the State or any State or Territory in the United States, the justices of the supreme judicial court, or either of them, upon petition filed by the party against whom the divorce was granted (if the party resided within this State at the time of granting the divorce) and upon such notice as the court shall order, may authorize such to marry again.

In *Thompson v. Thompson*, supra, the fact that the husband, the divorced party, attempted to remarry without leave of court was fatal to the validity of his second marriage. In that case, however, the divorce operating as an obstacle was obtained by his wife in the Commonwealth of Massachusetts, where he was then residing. But in the case at bar Harriet, Draper's first wife, was domiciled in Illinois, when and where she obtained her divorce from soldier. The supreme court of Massachusetts has held that the restriction imposed by the statute above quoted applies only to divorces granted in that Commonwealth. *Bullock v. Bullock* (122 Mass., 3). In that case it was held:

A person against whom a divorce for adultery has been obtained in another State, by the laws of which in such a case both parties may marry again, may contract a valid marriage in the Commonwealth without obtaining the leave of court provided for by Gen. Sts., c. 107, s. 26, and St. 1866, c. 214.

If the appellant be otherwise entitled, she is pensionable as the widow of Daniel H. Draper.

Actions reversed.

DESERTION—DISCHARGE—JOINT RESOLUTION OF JULY 1, 1902—BOUNTY.

JONATHAN KING.

The evidence satisfactorily establishes that the soldier did not receive any bounty or gratuity other than from the United States, upon his enlistment in Company D, Twelfth Kentucky Infantry, and having served for six months under his last enlistment and been honorably discharged therefrom, and his entire service thereunder having been faithful, he comes within the provisions of the joint resolution of July 1, 1902.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 3, 1904.*

This appellant, Jonathan King, on August 21, 1891, filed a claim, No. 1063368, for pension under the act of June 27, 1890, which was rejected April 15, 1896, on the ground that he was not honorably discharged from all service during the war of the rebellion, having deserted, and having never been discharged from Company G, Eighth Tennessee Cavalry.

Another claim filed September 22, 1902, under said act and the

joint resolution of July 1, 1902, was rejected February 17, 1904, on the ground of claimant's inability to show he did not receive bounty or gratuity, other than from the United States, on account of his subsequent enlistment in Company D, Twelfth Kentucky Infantry.

In this appeal filed March 4, 1904, claimant contends he has satisfactorily established his title to the benefit of said joint resolution, the second section of which provides:

SEC. 2. That in the administration of the pension laws any enlisted man of the Army, including Regulars, Volunteers, and Militia, or any appointed or enlisted man of the Navy or Marine Corps, who was honorably discharged from the last contract of service entered into by him during the late war of the rebellion, shall be held and considered to have been honorably discharged from all similar contracts of service previously entered into by him with the United States during said war:

Provided, That such enlisted or appointed man served not less than six months under said last enlistment or appointment, that his entire service under said last enlistment or appointment was faithful, and that he did not receive, by reason of said last enlistment or appointment any bounty or gratuity, other than that from the United States, in excess of that to which he would have been entitled if he had continued to serve faithfully until honorably discharged, under any contract of service previously entered into by him, either in the Army, Navy, or Marine Corps, during the war of the rebellion.

The records of the War Department show this claimant enlisted in his first service July 3, 1863, deserted therefrom December 20, 1863; enlisted in his second service May 11, 1864; and, as determined March 19, 1896, by the War Department, was honorably discharged as a minor from the latter service December 17, 1864, under Special Orders No. 142, paragraph 4, dated Headquarters Army of the Ohio, October 28, 1864.

According to claimant's testimony, he was attacked with smallpox and sent home by his captain about the last of December, 1863, with directions to return to his company as soon as recovered; that a few months later he attempted to return, but found, on arriving at Burnside, Ky., that he was liable to be captured if he continued toward his company, which he supposed to be in Ohio, and so enlisted in Company D, Twelfth Kentucky Cavalry, then at Burnside, Ky., and was detailed to headquarters at Nashville, where he remained for a while, awaiting discharge, after that regiment had left for service, and was finally sent home by the officer stationed there, who told him his discharge would be sent him, but he did not receive same until about five years ago (about 1893), and has since lost it.

The question of his age is not now involved, but it may be stated that he was, according to his own testimony, 22 years of age at his second enlistment, and according to one report from the War Department he was 19 years of age, and according to another, 20 years of age, on his first enlistment, so that he would appear, from these sources, to have been of lawful age for enlistment in 1864, when his second enlistment was made.

He testifies that he did not receive any bounty whatever on his second enlistment, and there is no evidence whatever tending to show that he did receive any, or tending to impeach his credibility as to any fact stated by him. Although ignorant and illiterate, he is stated to be of fair repute, and to have testified in a straightforward, convincing manner.

It is stated by a reviewer, on a slip in the case, that it does not appear possible to obtain satisfactory information as to payment of local bounties in the State of Kentucky; and the chief of the board of review states "we know as a fact that nothing in the way of evidence of individual payment of same can be obtained," and he, therefore, directs "rejection on the ground of inability to show that such was not received, etc."

The question of proof under said section 2 of said joint resolution was considered by the Department in the case of Isaac P. Brown, alias Albert B. Cole, decided March 23, 1904 (14 P. D., 375).

It was there held, in substance, that proof that a soldier "did not receive" the bounty or gratuity mentioned in said section is a statutory requirement, and that the question whether he did or did not receive it is one of judgment on all the evidence, and is to be determined from all the facts, circumstances, and conditions shown.

In this case there is, as stated, nothing to show that this claimant received any such bounty or gratuity. On the contrary, giving to his own testimony the credence to which it fairly appears to be entitled, the evidence, on the whole, tends to show he did not receive any such. His story is reasonable in itself, is not contradicted in any material part, and is corroborated as to many important facts. It is well known that absence from one's company in Kentucky in 1864 was dangerous, the opposing forces being in constant alternation over the same territory. He gives candidly the names of those under and with whom he served in the second service. He enlisted in that service under his own proper name, and in a locality where he was more or less well known, his home being on the border of that State and Tennessee. The testimony of comrades corroborates his statement that he enlisted as a recruit long after the organization of that company; that he was detailed to headquarters as a provost guard, and was left there when the regiment went to the front; and these facts stated, themselves tend to corroborate his story. This course would not be an unnatural one to pursue as to a refugee from another organization who was merely awaiting opportunity to rejoin it.

The trend of all these facts and circumstances shown in the evidence is toward the substantiation of the claimant's allegation and testimony, and as well toward the establishment, as a fact, that he did not receive any such bounty or gratuity. It is not known that any bounty or gratuity was ever paid or provided by the State of Kentucky, or by

any local governmental agency within that State; and it is, indeed, a matter of doubt, because of the peculiar position occupied during the war by the people of that State, they being almost equally divided between the opposing forces, whether any such bounty or gratuity was paid at all anywhere within the State.

The evidence herein is, therefore, held to satisfactorily establish as a fact that this claimant did not receive, on his second enlistment, any bounty or gratuity other than from the United States, as provided in said second section of said joint resolution, and he is entitled accordingly to the benefits of that section, the other conditions of fact therein mentioned being shown.

The action appealed from is reversed, and you will readjudicate the claim in accordance with the foregoing.

MARRIAGE—ESTOPPEL—CONDUCT—REPUTATION.

JENNETTE THOMPSON (WIDOW).

A claimant who has for years sustained toward a man a de facto relation of marriage, claiming and professing to be his wife, acting as such, and has been so acknowledged by him and accepted by the public generally, is estopped from establishing a pensionable status by denying there was any marriage between them.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 11, 1904.*

This appellant, Jennette Thompson, was allowed pension, certificate No. 47728, in May, 1865, as widow of William W. Thompson, who died October 29, 1864, while a member of Company F, Fifteenth Connecticut Infantry, and drew such pension to September 4, 1870, three years after which her name was dropped from the rolls under section 4719 of the Revised Statutes.

On November 4, 1874, and May 25, 1893, she filed claims for restoration, which were rejected April 26, 1894, on the ground of her adulterous cohabitation from 1870 to 1890 with one D. M. Case. On appeal, this ground of rejection was disapproved August 18, 1894, the act of August 7, 1882, as to adulterous cohabitation of a widow, being held not applicable as to cohabitation prior to its passage; but rejection of claim was affirmed upon the ground that the presumption, under said section 4719, is that claimant remarried, and for this reason failed to draw her pension, and that such presumption of the law is strengthened in fact by her own admission of cohabitation with said Case and birth of two children by him (7 P. D., 262).

The claim was subsequently reopened and was again rejected December 10, 1897, on substantially the same ground upon which the Department affirmed the former rejection, as above stated; and on a second

appeal this rejection was again affirmed by the Department on August 25, 1899.

No new evidence appears in the case, but on January 20, 1904, was filed the present appeal, which is in the nature of a motion for reconsideration of the last-mentioned decision, and contends, in substance, that no presumption of this claimant's remarriage can obtain, because the evidence shows positively and definitely that no celebration of marriage was ever had in either Connecticut, Massachusetts, or New York, in which States, at different periods, she and said Case lived from 1870 to 1890, a marriage without celebration being, it is alleged, not valid in either of these States.

It might be admitted that no marriage between claimant and said Case was contracted in either of these States without, by such admission, necessarily holding that the presumption of her remarriage, arising under said section 4719, should not obtain, as they may have contracted a valid marriage in some other of the States.

But it is unnecessary in this case to consider at all the question of fact raised whether there was a marriage between the claimant and said Case at any time or in any place, as she has, by her admitted conduct in associating for twenty years with him as his wife, going under his name, being introduced by him as his wife, and accepted generally by the community as such, and bearing him two children, raised an effectual estoppel to any denial by her that they were married people.

These admitted facts are themselves competent and sufficient evidence in the State of Connecticut, where she and said Case lived from 1870 to 1874, of the fact of marriage (*Hammick v. Bronson*, 5 Day, 290; *Budington v. Munson*, 33 Conn., 481; *Northrop v. Knowles*, 52 Conn., 522); and the same rule prevails in both Massachusetts and New York and generally, even where a celebration is essential to the validity of marriage.

Upon considerations of public policy, marriage being a public institution, upon the integrity and stability of which society rests, the law does not allow one who has professed for many years to be married, and has been accepted by the public as married, to repudiate, at his own will and for his own selfish purposes, his past professions and set up his immorality and unlawful practices as the foundation of a right of action or of defense. It is a legal maxim that a party can not take advantage of his own wrong and be allowed to stultify himself before the courts. It is to the interests of society that lawful marriage exist, and that it be, as an institution, encouraged, fostered, and protected, as well for the sake of offspring and the security of third parties, who may rely upon the ostensible relationship of the parties thereto, as for the sake of the perpetuity of society itself. The institution is to be respected, and in order to command respect the law will not allow it to be treated with impunity by parties using it as a cloak

for respectability, to be doffed when material interests are at stake and again donned when material interests may be thereby affected.

In the interests of good order and good morals, parties who pretend marriage are held to their pretensions, and only third parties, if any one, may question their relationship, and "even in such cases the authorities restrain the negative evidence (that parties were not married) within narrow limits" (*Northrop v. Knowles*, *supra*).

In that case a marriage established by the testimony of one of the parties thereto, and by a certificate of marriage identified by such party, was sought to be disproved by evidence of reputation that they were not married; which evidence, however, the court excluded as incompetent.

In Tennessee, in the case of *Johnson v. Johnson* (1 Cold., 626), the defendant, who had for years lived with the plaintiff as his wife, was held to be estopped, in a suit between them over property rights, from denying the validity of their apparent relation.

So, also, in the case of *Wilkinson v. Payne* (4 Term R., 468), cited in the case of *Johnson v. Johnson*, *supra*, the court held that the defendant, sued upon a note given in consideration of his daughter's marriage, was estopped from setting up that she was not married by the fact that he had recognized her as married.

In *Everett v. Morrison* (69 Hun., 146), where a wife sought to deny the validity of her marriage because she did not, in fact, express words of assent at its celebration, the court said:

It can not be accepted by the courts that a woman may silently withhold her assent to a formal marriage and treat it as a good marriage subsequently, and annul the marriage because it was not real and binding on her.

In *Mason v. Mason* (101 Ind., 25), a suit for divorce, wherein the defendant set up the illegality of the marriage because contracted within two years after the complainant's divorce from a prior marriage, the statute declaring such divorcee incompetent within that period to remarry, the court held the defendant estopped from such defense by the fact that he had continued for two years after said period to live with the complainant and recognize her as his wife.

In *Divoll v. Leadbetter* (21 Mass., 220), an action of trespass *quare clausum fregit* upon the wife's land taken on the plaintiff's execution, the court rendered the following expressive and forceful decision:

The evidence is sufficient to prove a marriage *de facto* and indeed a lawful marriage if the parties were legally capable of making that contract. By our statute, however, the marriage, being within the prohibited degrees of kindred, is void, but the question is whether the defendant can set up the illegality as a defense to the action. If he can, this strange consequence will follow, that he may continue in open violation of the law, enjoying all the material rights, and yet when attempted to be made subject to the duties or legal burdens of the connection he would defend himself by setting up this illegality. This would be contrary to morality as well as the policy of the law. If this marriage be void for the cause supposed, then the defendant

has no right to the possession or the profits of this estate, and yet he would defend himself against the claim of another by showing this very illegality. If a man's mouth is ever stopped in court it should be when he undertakes to claim a right or an exemption on account of his guilt or infamy.

In accordance with this sound and well-established principle of estoppel, this claimant can not be allowed to set up herein, in rebuttal of the presumption of her remarriage, the illicitness of her relations with said Case, which for twenty years she and he and the community generally recognized as licit. As stated above, the evidence as to their relations is competent and sufficient evidence, under the decisions of the courts of Connecticut, where such relations had their inception, as well as in the other States in which they resided, to establish a valid marriage between them, and strengthens such presumption arising under section 4719 of the Revised Statutes.

The action appealed from is again affirmed accordingly.

DIVISION—ACT OF MARCH 3, 1899—PRACTICE—APPEAL.

ELLIOTT v. ELLIOTT.

The assignments of error in this case are general, not specific, as required by rule 19 of practice, which requires that the appeal should briefly, but specifically, state the error of law or fact complained of and the grounds relied upon for reversing or modifying the Bureau action appealed from.

This is a rule of order and convenience based upon the recognized right of the appellee to actual notice of the appeal and information as to the grounds relied upon by the appellant for reversing or modifying the Bureau action.

Good practice, as well as justice and fairness to appellees, the Bureau, and this Department, requires a compliance with the requirements of said rule in cases arising under the act of March 3, 1899.

For noncompliance with said rule 19 of practice, requiring specific assignments of error, the appeal is, on motion of attorney for appellee, dismissed.

The defect in the appeal is not cured by the brief in this case.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 11, 1904.*

Huston Elliott, a pensioner under certificate No. 138099, appealed April 1, 1904, from the Bureau action of February 29, 1904, wherein the claim of his wife, Katie, filed July 8, 1903, for one-half of his pension, was allowed upon the ground that pensioner was an inmate of a branch of the National Home for Disabled Volunteer Soldiers, and that claimant was his lawful wife, of good moral character, and in necessitous circumstances.

Pensioner in his said appeal, after reciting said Bureau action, assigns the following reasons for reversing the action of the Bureau:

1. Said decision is contrary to the evidence and facts proven in the case.
2. That said decision is contrary to the law in the case.

3. That said decision of the Honorable Commissioner of Pensions should have been in favor of the appellant and against the appellee.

Wherefore, said Huston Elliott appeals from said decision and prays for a review of said case by the Honorable Secretary of the Interior, and for decision of said case in appellant's favor.

Claimant, by her attorney, J. C. Smith, esq., contends that said appeal is defective in that it does not comply with Rule 19 of Practice, and requests that said appeal be dismissed, citing departmental decision in the case of *Sheldon v. Sheldon* (13 P. D., 542).

In that case the appellant's assignments of errors were as follows:

1. The decision of the Honorable Commissioner of Pensions is against the spirit and intent of the pension laws.

2. It is against the evidence on file in said case.

3. It is against the law of the land.

It was contended by the appellee that said appeal did not state the errors of law specifically or otherwise, or the grounds relied upon for reversing or modifying the Bureau action appealed from, and therefore should not have been filed, docketed, or considered, nor operate to suspend payment of the one-half payment in controversy.

In disposing of the question in that case it was said:

Rule 19 of Practice, a copy of which was served upon appellant prior to the execution of his said appeal, requires that the appeal "should briefly but specifically state the error of law or fact complained of and the grounds relied upon for reversing or modifying the Bureau action appealed from."

The purpose of this rule is twofold: To advise the opposite parties or appellees as to what they will be called upon to defend, and to aid the Department in reviewing the case upon an orderly presentation of the errors relied upon, and at a glance and without laborious research ascertain the precise grounds asserted against the legality or regularity of the Bureau action complained of. The rule is not so far jurisdictional that the Department may not entertain the appeal and notice a plain error not assigned or certified. General objections to the action appealed from amount simply to an assertion that the appellant objects, and nothing practicable is accomplished by such assignments, as they leave the Department to hunt for the real objection, if any. The appeal should be an aid to the Department in discovering the error complained of. An assignment which simply alleges that the Bureau action is contrary to the law and the evidence, without specifying in what respect it is contrary to the law or wherein the evidence is insufficient to justify the conclusions of the Bureau, is defective and simply amounts to a request for this Department to retry and readjudicate the case. The Bureau, and not this Department, is the adjudicating agency of the Government in ascertaining and determining the legal rights of claimants and pensioners under the act of March 3, 1890, and unless the party alleged to be aggrieved by the Bureau action is able to point out some specific error, the action of the Bureau should, in the absence of plain and unmistakable error, not be disturbed.

The assignments of error in this case are general, not specific, as required by Rule 19 of Practice, and, as stated in the case of *Scott v. Scott* (12 P. D., 411), "Good practice, as well as justice and fairness to the appellee, requires a strict compliance with the requirements of said rule in cases under the act of March 3, 1890."

The Rule 2, referred to in the above decision, is now embodied in said Rule 19. This is a rule of order and convenience, but is not designed to prevent the correction of obvious errors or an affirmation of an action appealed from where no error is apparent from the record.

It was accordingly held that said assignments of error were general, not specific, as required by Rule 19 of Practice, which requires that appeals should briefly, but specifically, state the error of law or fact complained of and the grounds relied upon for reversing or modifying the Bureau action appealed from. This is a rule of order and convenience, based upon the recognized right of the appellee to actual notice of the appeal, and information as to grounds relied upon by the appellant for reversing or modifying the action of the Bureau.

The Department has uniformly held that the appellee was entitled to notice and a copy of the appeal and proof of service thereof as required by Rule 17 of Practice (formerly Rule 14). See *Hogg v. Hogg* (13 P. D., 206), and the authorities therein cited.

The essential elements of due process of law are notice and an opportunity to defend. (*Simon v. Croft*, 182 U. S., 427.) To adjudicate upon the legal rights of a party, without notice, is obnoxious to all sense of justice and a violation of the fundamental principles underlying American jurisprudence. Good practice, therefore, as well as justice and fairness to appellees, the Bureau, and this Department, requires a compliance with the requirements of said Rule 19 in cases arising under the act of March 3, 1899, as otherwise the object of Rule 17, as well as of Rule 19, would be defeated.

For noncompliance with said Rule 19 of Practice, requiring specific assignments of error, the appeal is, on motion of attorney for appellee, dismissed.

While the appellant in this case has filed a brief in which he specifies the grounds relied upon for reversing said action, it does not cure the defect in the appeal for the reason that a copy of the brief was not served upon the appellee or her attorney.

LEGITIMACY—MARRIAGE—KENTUCKY LAWS—SLAVES—ACT OF AUGUST 7, 1882—DEPENDENT FATHER.

PATRICK CHAMBERS (FATHER).

The claimant and the mother of the soldier contracted a valid slave marriage, but never ratified the same under the laws of Kentucky, the State in which they resided.

Held, the laws of the State of Kentucky made the children of this slave marriage legitimate; and inasmuch as this claiming father could inherit from soldier, his legal status as a father is established.

It is the *lex loci* which governs in such a case as the present one, wholly apart from the act of August 7, 1882, which has no bearing upon the issue herein involved. Opinion in the case of *Gus Johnson*, 8 P. D., 463, is hereby modified.

Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 14, 1904.

Patrick, alleged dependent father of Clifford Chambers, formerly a corporal in Company A, Forty-ninth U. S. Volunteer Infantry, war

with Spain, filed his declaration under the general law on September 21, 1901, claim being rejected September 8, 1902, on the ground of no title, in that the soldier was the illegitimate son of claimant. An appeal was filed January 2, 1903.

Soldier died in the service in line of duty on May 27, 1901. Special examination was held in this case and the admitted facts are as follows:

Claimant married the mother of soldier in the year 1862, in the State of Kentucky, while both were slaves, and the marriage was surrounded by all the forms and ceremonies necessary to constitute what is known as a valid slave marriage. They lived together as husband and wife until the mother's death in 1893, had several children born to them, and all facts necessary to establish a bona fide matrimonial intent and relation have been brought out in evidence. They failed to comply with the act of February 14, 1866, passed by the legislature of the State of Kentucky, although claimant asserts that he thought he had fully conformed with the requirements of said law.

The act of February 14, 1866, not only provided for a ratification of certain slave marriages, but said act also contained the following:

The issue of customary marriages of negroes shall be held to be legitimate.

In construing this statute the supreme court of the State of Kentucky, in *Brown v. McGee* (12 Bush, 428), said:

The issue of customary marriages between negroes shall be held legitimate, although the parents were not both living, or not living together as man and wife at the time of the passage of this act of February 14, 1866, or if then living together, although they failed to legalize their marriage in the mode prescribed by said act.

Where one of the parties to such customary marriages died before the passage of the act of February 14, 1866, the issue of such marriage shall be held legitimate.

The legislature seems to have anticipated the fact that some of the race might not be in a condition to avail themselves of the provisions of the act, and others might neglect or refuse to do so, and therefore inserted a proviso by which the issue of customary marriages were made legitimate. This proviso applies to all children the issue of customary marriages entered into between negroes prior to its passage.

It was demonstrated in the opinion in the case of *Daniel Bird* (10 P. D., 104) that none of the Federal statutes have any bearing upon this issue. The act of August 7, 1882, can not possibly apply, for it is apparent, upon a careful study of said act, that no claim of a dependent parent which involved the legitimacy of a son could be based upon the terms of the act. It is necessary, therefore, to refer to basic principles, for it can hardly be said that an actual father should be barred of his right to pension simply because there is no Federal statute by which his technical status as a father is defined.

Domestic relations are governed, in the absence of Federal statutes by the *lex loci*, wholly independent of the terms of the act of August 7, 1882; and the proposition may be stated as follows:

If a father would inherit from one who was the fruit of his loins, then he might be called a legal father for lack of a better term to

express the meaning; and if in the case under consideration this claimant would inherit from his son, then it may be truthfully said that he is a dependent father within the meaning of these words; that is, his legal status as a father has been established.

In the present case, it having arisen within the jurisdiction of the State of Kentucky, it is to the laws of that State that the Department must turn in deciding this issue; and by referring to the case of *Brown v. McGee*, *supra*, there can be but one conclusion. This soldier was the legitimate child of the claimant, and the claimant not only would, but could, lawfully inherit from such son; and this being true, this claimant has established his status as the father of Clifford Chambers.

Attention is invited to the opinion in the case of Gus Johnson (8 P. D., 463). Said opinion is apparently based upon the act of August 7, 1882, but, so far as said act is concerned, it has no bearing upon the case, and said opinion is consequently explained and modified by this present one.

Attention is also invited to the opinion in the case of Daniel Bird, *supra*, which, upon a close examination, will not be found to be in conflict with the case now under consideration. The Bird case arose under the statutes of the State of Louisiana, the *lex loci*, and it was by the law of that State, as construed by the supreme court of Louisiana, that Bird was denied a pension. The laws of Louisiana, under the facts in that case, did not make Bird's son legitimate, but the laws of the State of Kentucky, under the facts in this present case, made Clifford Chambers the legitimate son of this claimant.

By reason of the foregoing the action of the Bureau can not be sustained.

Action reversed.

MARRIAGE—MISSISSIPPI LAWS—COHABITATION.

AMANDA TAYLOR, NOW ROBINSON (WIDOW).

Widow was formally married to soldier in 1870 in Mississippi. Prior to that date she cohabited for some time with one Shaw, with whom she was living at the time of the adoption of the constitution of that State, December 1, 1869. The evidence does not show a matrimonial intention characterizing her cohabitation with said Shaw. *Held*: That the effect of article 12, section 22, of said constitution was not to force the marital estate upon those not intending it, albeit they were cohabiting like husband and wife on the date of its adoption. Her relations with Shaw not being matrimonial, she had full capacity to contract the marriage with soldier and is, therefore, his widow.

Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 14, 1904.

Spencer Taylor, Company G, Twenty-ninth U. S. Colored Volunteer Infantry, died on December 11, 1889, leaving a widow, Amanda,

and five minor children. Amanda has since been remarried to one Robinson, on December 23, 1891.

On February 20, 1890, she applied for pension under the general law, and on July 26, 1890, for pension under the act of June 27, 1890 (No. 415371). Subsequent to her remarriage, i. e., on November 26, 1895, Spencer Taylor, jr., Cyrus Taylor, Louisa Taylor, and Mary Taylor, minors, by their guardian, applied for pension under the act of June 27, 1890 (No. 624681).

On November 17, 1902, all of said claims were rejected on a common ground, that Amanda was never the "legal wife" of the soldier; that she is therefore not his widow, and that the children are therefore illegitimate. This position is taken on the assumption that Amanda, some time prior to her marriage to Taylor, was legally married to one Eli Shaw, who survives soldier and from whom she was never divorced. This is the sole question in the case. It is admitted on Amanda's part that she lived with Shaw for a few months prior to her marriage to Taylor, to whom she was ceremonially married on July 5, 1870, and with whom she lived until his death. It is contended by her that her relations with Shaw did not constitute a marriage. She appealed December 31, 1902.

It is not claimed by the Pension Bureau that she and Shaw were married by ceremony. It is claimed that they certainly lived together as husband and wife in the State of Mississippi for some time prior to the adoption of the constitutional provision of December 1, 1869, in that State; that they were so living together on December 1, 1869, and that by operation of said provision a marriage took place as binding upon these parties as if it had been duly solemnized by a ceremony. The constitutional provision (sec. 22, art. 12) upon which this marriage is predicated is as follows:

All persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held for all purposes in law, as married, and their children, whether born before or after ratification of the constitution, shall be legitimate; and the legislature may, by law, punish adultery and concubinage.

It is not absolutely certain from the evidence whether or not they were living together on December 1, 1869. A number of witnesses were specially examined. Their testimony is too vague and indefinite to furnish a solution of the question. All remember that Shaw and Amanda "took up" with one another, for a longer or shorter period according to their different recollections of the matter. Some fixed the date shortly after the close of the war, some later. None had positive knowledge that their cohabitation extended beyond December 1, 1869; and all clearly understood one thing—which is material to the issue—that they were not married, but were indulgently called man and wife. Eli Shaw protests that their relations terminated in 1868; that their cohabitation extended from the spring of 1867 to the spring

of 1868. On the other hand, Amanda says that they commenced to cohabit in the spring of 1869 and that they separated just two weeks before Christmas of that year, i. e., on December 11, 1869. This admission, adverse in its nature to her interests, may be accepted as the best evidence upon this point. Surely she was in a position to know; it was the Christmas before she was married to Taylor, and that date is fixed by record evidence, in July, 1870. Again, she was enceinte by Shaw when they separated. The child was born in the month of March after their separation. It was in the month of July following that she married soldier. This, we know, was in the year 1870. From these data, facts of superlative importance in a woman's life, it can be definitely accepted that they were cohabiting on December 1, 1869.

But it does not necessarily follow that they thereby became legally married. Said constitutional provision by no means forced matrimony upon those not desiring to live in that estate. The case of *Floyd v. Calvert* (53 Miss., 37) has been referred to in other decisions of this Department upon that point. The effect of that decision was to require some evidence of a "formal and explicit agreement of the parties" to accept the newly established organic law of the State, in order to constitute prior concubinage a valid marriage. An exposition of the same point was made in an earlier case in Mississippi, that of *Rundle v. Pegram* (49 Miss., 751), wherein the court said:

The constitution did not intend to sanctify the marital relation between a man and a woman because they were cohabiting together like husband and wife, although such "living together" may have extended through one, two, three, or more years, and although it may have been public and notorious, unless the parties desired, intended, and in some mode distinct and cognizable, accepted the constitution as legalizing the relation. There did exist among the colored people the marital relation; the parental and filial authority was completely recognized, although in a legal sense they never had been married. Where these relations, or the former alone, existed by the recognition of the parties and of others the constitution at once established legal relation. But where there was an impediment in the way, and the intercourse of the parties was begun unlawfully, and without any intention or reference to marriage, although cohabitation may have been continuous and long, the fair presumption would be that the relation continued as it began, without change, unless there was a distinct consent given to each other to change from the meretricious to the marital state.

It therefore is a matter of fact, to be determined from the evidence in all cases, whether the relation existing before the adoption of the constitution was matrimonial in its intent; if not, the constitution did not operate "to sanctify the marital relation between a man and woman" simply because they happened on December 1, 1869, to be living together.

It will be borne in mind that these parties, claimant and Shaw, did not commence their cohabitation during slavery. This is not a case where a "marital relation," with the recognition of parental and filial authority, existed in slavery and continued thereafter until subsequent

to the adoption of the constitution. Here were two colored people who in 1869 had full capacity to contract a "white man's marriage," as claimant and soldier did later. Instead of a ceremonial marriage, they elected that form of mating which had not even the quasi sanctity of a slave marriage. They simply "took up" with each other. Both parties say that they lived as man and wife and that Amanda bore Shaw's name during the period of their cohabitation and even afterwards. But both say they were not married. No one was fooled by their cohabitation. By courtesy they were regarded and treated as man and wife, and yet all knew that they were not married. When Amanda was asked if they were ever divorced, she replied that they were not, naively remarking that there was no occasion for it, since they had never been married. Their mating was temporary; neither apparently took the other in marriage for the terms of their lives. It was a relation not dissimilar from that to which they were accustomed in slavery and not greatly unlike that of the beasts of the fields. That there was another status in which man and woman lived, they very well knew—marriage by a ceremony, such as that taking place between soldier and the claimant, within a few months of the time of their separation.

Why they separated is not in evidence. The fact that their separation took place about the time of the adoption of a law whereby their continued cohabitation might be changed in character, binding them together for life, is in itself an intimation that they did not desire marriage. And it is almost inconceivable how a woman about to become a mother should voluntarily separate herself from the father of her child if she felt and understood that they were legally, indissolubly, married.

It is therefore found as a fact that Shaw and Amanda did not intend marriage and were not legally married, albeit they may have been cohabiting on December 1, 1869. No obstacle to the marriage between soldier and herself existed; and she may, for pensionable purposes, be regarded as soldier's widow. It therefore follows that the actions appealed from were erroneous. They are hereby reversed, and upon return of the papers herewith you will readjudicate these cases in accordance with this decision, admitting the claims if the claimants be otherwise entitled.

DIVISION OF PENSION—ACT OF MARCH 3, 1899—DOMICILE—EVIDENCE.

CLARKE v. CLARKE.

Claimant having been paid one-half her husband's pension under an application, void because prematurely filed, the pensioner is entitled to be reimbursed the one-half pension thus wrongfully withheld from him, less an overpayment made him after his wife had filed a valid application which was properly allowed and to which she was legally entitled.

Where, after an ex parte special examination of claimant and her witnesses, the case is reopened and another special examination ordered, of which pensioner is duly notified, but declines to avail himself of his right to be present in person or by attorney, he is estopped to allege as error the lack of notice in the prior special examination.

Pensioner's contentions that claimant is not his lawful wife; that he did not desert her, but that she deserted him, and that he did not have notice of the special examination or an opportunity to present his witnesses and cross-examine claimant and her witnesses, are not sustained by the evidence in this case.

Claimant, having been deserted by her husband, was entitled to her separate domicile. His marital duty required him to return to her in order to terminate the period of his desertion, and if upon his return to her domicile with the offer to resume marital relations she was legally justified in refusing to accept his offer, she is not chargeable with desertion by reason of such refusal.

The fact that pensioner's suit against claimant for divorce, commenced in 1900, is still pending, affords no sufficient reason for further delaying the consideration of his appeal or directing further special examination.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 14, 1904.

Alfred R. Clarke, a pensioner under certificate No. 817136, appealed January 20, 1903, from the Bureau action of December 18, 1902, allowing the claim of his wife, Mary A., filed September 13, 1901, for one-half his pension, wherein it was held that "pensioner deserted claimant, his lawful wife, who is a person of good moral character and in necessitous circumstances."

It is contended on behalf of pensioner by D. W. Glassie, esq., his attorney, that said Bureau action is not sustained by legal proof, and should be set aside for the following reasons, to wit:

First. The testimony adduced in support of claimant's demand was taken ex parte, and without notice; that appellant was not given the names of the witnesses to be produced against him; that he was not advised of the time or place of taking testimony in support of the claim; that he was given no opportunity to cross-examine witnesses nor advised as to the character or scope of the testimony adduced in behalf of claimant, and was afforded no opportunity to call witnesses in his behalf after the case was put in the hands of a special examiner.

Second. That there exists no evidence of any legal marriage ever having been consummated between claimant and appellant; that there was an entry of marriage having been consummated between Alfred Clarke and Catharine Gill, who died in Philadelphia April 22, 1892, which entry was in a book alleged to be the parochial register of marriages kept in St. John the Baptist Church at Manayunk, Philadelphia, but no clean record of a marriage with Mary can be found; that the above-mentioned record was mutilated between July and September 4, 1900, after the death of Catharine and after the death of the best said to have performed the marriage ceremony and to have

made the original entry, and after the proceedings hereinafter mentioned had been commenced in the supreme court of the District of Columbia; that there is a lack of legal evidence to identify claimant and appellant with the persons named in said parochial entry either before or after its mutilation; that if claimant is the woman who lived with appellant off and on for a number of years there can be no merit in her claim, because she willfully and without cause abandoned him over twenty-six years ago, and for over twenty-four years concealed from him the fact of her existence or her whereabouts, although she well knew where to reach him in person or by mail; that the law presumes her dead and will not permit her to assert a claim to the prejudice of recognized and vested rights; that she abandoned him in the spring of 1875 or 1876 and left no trace of where she was going or what she proposed to do; that she refused to answer his letter and concealed her whereabouts from him for twenty-four years; that the question herein involved is now pending before the supreme court of the District of Columbia and should not now be passed upon on *ex parte* testimony.

Claimant, by Andrew Y. Bradley, her attorney, in answer to said appeal, denies appellant's contention as to want of notice and refers to the report of the special examiner to show that pensioner was afforded an opportunity to make a statement in opposition to the claim of the appellee, which he declined to do upon the advice of counsel; that the appeal is not under oath, and that the allegations therein contained are not supported by the evidence as disclosed by the record herein; that appellant's statements in his said appeal are in direct conflict with his sworn statements contained in paragraph 2 of his bill of divorce filed in the supreme court of the District of Columbia April 13, 1900, wherein he swore:

That the petitioner was married to Mary A. Gill, the defendant, by the name of Catherine Gill, about February 1, 1866, by the Rev. Father P. A. Nugent, rector St. John the Baptist Church, at Manayunk, Philadelphia, Pa., and petitioner and his said wife, the defendant, lived and cohabited together as husband and wife from time to time until the late spring of 1872 or 1875, as shown further on, and three children were born to said marriage, viz, Frank R., now dead, born about July 1, 1868; Alfred, born about the last of 1871 or the early part of 1872, and Marie, born about the fall of 1874 or 1875; the last two named, now of full age, reside in Philadelphia aforesaid.

It is further contended on behalf of claimant that the pendency of proceedings in the supreme court of the District of Columbia furnish no grounds for a stay of proceedings herein, as such condition is due wholly to the conduct of said appellant and is a material and cogent fact in support of the justice of the claim of the appellee.

The appeal in this case was considered in part February 24, 1903, when the papers were returned for further special examination and

the Bureau instructed to take such action as the further testimony might warrant, and return the papers with a report.

On March 16, 1904, the papers were called for by the Department and again returned to the Bureau March 24, 1904, for a completion of the action and report directed in the communication of February 24, 1903, and also further report what action, if any, had been taken toward reimbursing pensioner moneys paid the wife under the Bureau action of February 20, 1900.

On April 5, 1904, the Bureau forwarded the papers to this Department with a report that after further special examination the claim for the wife had again been approved for admission. The Bureau further reported as follows:

Reverting to the reimbursement suggested in your letter of March 24, ultimo, it is to be remarked that the first claim of the wife was predicated upon a declaration filed August 31, 1899. This claim was adjudicated and approved for admission February 20, 1900, and the beneficiary was paid the sum of \$84 in the interval between the admission of the claim and the date of dropping her name from the rolls, September 10, 1901, under the decision in the Rothery case of September 5, 1900.

As the claim under the first declaration, filed August 31, 1899, and the payments made under said claim were illegal, refundment to the pensioner of the amount stated has this day been made under the decision in the Henry N. Rothery case, dated February 23, 1901, subject, however, to the following offset, namely:

The wife renewed her claim in a declaration filed September 13, 1901, and the order of suspension of one-half the soldier's pension under this declaration was not issued until May 29, 1902; and, as a consequence, the one-half pension, which should have been suspended in the December 4, 1901, and the March 4, 1902, payments was erroneously paid to the pensioner. This amount, which should have been suspended, namely, \$24, has been treated as an offset in the refundment now made to the pensioner, and which, therefore, left a balance of \$60, which the United States pension agent at Washington, D. C., has been directed to pay to him as a refundment in the first claim filed by the wife, and the balance, \$24, is held in suspension, in addition to the amount now being held in suspension under the order of May 29, 1902, awaiting the decision of the honorable the Secretary of the Interior in the wife's second claim, now pending.

In reference to so much of this case as relates to the foregoing reimbursement, it may be stated that claimant filed her first application August 31, 1899, basing her claim for one-half her husband's pension on the first proviso of the act of March 3, 1899, which provides for a division of pension where the husband shall desert his wife for six months. This statutory period of desertion clearly relates to a desertion existing and continuing for six months subsequent to the passage of said act. Her declaration was, therefore, premature, and the allowance of her claim thereunder, February 20, 1900, was clearly error, and her name was dropped from the roll September 10, 1901. That the restoration to pensioner of the \$84, less the \$24 offset, appears to have been proper and in accordance with departmental decisions applicable thereto, see *Richard v. Richards* (11 P. D., 90), *Henry N. Rothery* (ibid, 255), *Adams v. Adams* (12 P. D., 370), *Kilmer v. Kilmer* (13 P. D., 270), and *Frederick W. Hyatt* (14 P. D., 367).

Failure to suspend payment of one-half of soldier's pension, upon the wife's filing a valid application, resulted in an overpayment to him of \$24 to which the wife is entitled.

So much of pensioner's contention as related to lack of notice of the special examination is not sustained by the facts. He was duly notified of the special examination of claimant and her witnesses April 8, 1903, and acknowledged receipt of said notice April 3, 1903, but waived his right to be present, as appears from the record of this case.

Where, after an ex parte special examination of claimant and her witnesses, the case is reopened and another special examination ordered, of which pensioner is duly notified, but declines to avail himself of his right to be present in person or by attorney, he is estopped to allege as error the lack of notice in the prior special examination.

So, also, pensioner's contentions that claimant is not his lawful wife; that he did not desert her, but that she deserted him, and that he did not have notice of the special examination or an opportunity to present his witnesses and cross-examine claimant and her witnesses, are not sustained by the evidence in this case.

Much stress is laid upon the alteration of the marriage record, wherein the name of claimant's sister, Catherine, was erased and the name of claimant inserted. But the marriage certificate alone is not proof of marriage, and the church record in this case could be eliminated without in any manner affecting the merits of the case, as the evidence, as well as pensioner's admissions, establishes beyond any reasonable doubt that he was married to claimant at the time and place stated in said marriage certificate; that the parties cohabited as husband and wife in the States of Pennsylvania and New Jersey up to about July, 1875, when he deserted her at Philadelphia, Pa., and has not since resided with claimant or contributed to her support. The evidence further shows that pensioner had previously deserted claimant, once in 1872, when claimant had him arrested on the charge of desertion, when he was convicted and required to contribute to the support of claimant and their two children, and in default of bonds was imprisoned. Shortly after being released from imprisonment, upon the solicitation of the wife, he appears to have gone to Hague, Va., where claimant visited him at his father's home, returning to her own domicile in Philadelphia, Pa., where she has ever since resided.

Pensioner seeks to charge claimant with having deserted him at Hague, Va., in the summer of 1875, and that she had refused his offer of a home. He has offered the testimony of several witnesses who testified in her suit for divorce tending to show that she deserted him at Hague, Va., in 1875.

It appears from the testimony of these witnesses, who testified in 1902, that they were very uncertain as to their dates.

Claimant testified before the special examiner April 8, 1903, that after she had him arrested for desertion he was sent to prison, where

he remained several months, and that she finally got an order from the court for his release; that immediately upon his release he went to Hague, Va., where his parents were living; that after he had been down there some time he sent for her and she took one of their children and went down there and stayed with him a week; that she may have stayed more than a week—is not certain as to that; that he gave her no money, but that she paid her own expenses down there and back; that some two or three months after her return from Virginia her husband came to see her at Manayunk and proposed that if she would leave her people and go with him he would come back and behave himself and they would live together; that they then went to Passaic, N. J., where she went to work in a blanket mill, and got her husband a place as a carpenter in the same mill; that he did right for a time, but in less than a year he left her and returned to Philadelphia and she subsequently rejoined him there, and they rented a house on Kater street, above Broad street.

She further testified as follows:

We were there only two months when our household goods were levied upon for rent. I saved as much of the goods as I could, and he went to board at 1713 North Tenth street with a family named Silas Kerns. Mrs. Kerns rented rooms for me at 1715 North Tenth street, where I moved all the furniture I had saved. My husband came in there the next morning after we had moved in and said he was going away to work and would be home that night. He kissed me good-by and took his tools and went away. I never saw him again until about three years ago, when he came back to me here and wanted me to live with him again. I told him that if he could prove to me, or that he could give me a good account of himself, where he had been all the years he was away I would take him back. He told me he had not remarried, but that he had been wandering around all those years and that he then just came from Georgia. He bothered me every day for a week begging me to take him back, but I refused to do so until I found where he had been. He even begged my son Alfred to coax me to take him back. Finally he went away, and I have never seen him since. I afterwards learned that he had married and was living with a woman in Washington, so I went down there and saw the woman he had married and she told me who had married them.

* * * * *

I became acquainted with Mr. Clarke some six or seven years prior to my marriage to him and while I was a young girl. His mother, who is now dead, was the means of bringing us together. Neither one of us was previously married. I was married to him on February 1, 1866, by Rev. Father Nugent at the parochial residence of St. John the Baptist Church at Manayunk, this city. The witnesses present at our marriage were my sister, Catherine Gill, now dead, and Peter O'Hara, who is now an inmate of the Soldiers' Home at Dayton, Ohio, were the witnesses to our marriage. Peter O'Hara was an intimate friend of my husband and served with him in the Fifth Pennsylvania Cavalry. He also knew me from childhood. I know there was some mistake made in recording our marriage in the records of the church. I went to the church and got a copy of the record from Father Breheny, and afterwards got a copy from Father Murphy of the same church. I did not notice at first that the name of the bride was given as Catherine Gill and the witness as Mary Gill, but I learned that afterwards by seeing it on the books. That was a mistake of Father Nugent in recording the marriage. Mary Ann Gill was my full maiden name. I

seldom use the initial A. in my name when writing it. I did not use the middle initial in all my testimony. When I married Mr. Clarke he spelled his name without the final "e," but when I went to make this claim I found he was pensioned under the name of Clarke, so I took the final e to save complications; however, I had never used it before. I had three children by Mr. Clarke that lived, to wit: Francis R. Clarke, born December 14, 1866; Alfred Joseph Clarke, born March 19, 1870; Marie Clarke, born September 9, 1875. Francis and Alfred were christened in St. John the Baptist Church at Manayunk, where I was married, and Marie was christened in the St. Malachi on Eleventh street, this city.

Claimant, who is shown to be a woman of good reputation and whose character is shown to be excellent and unquestioned by anyone but her husband, has supported her testimony by a large number of witnesses of good reputation, who have been intimately acquainted with her, and some of whom have known her prior to and continuously since her marriage to pensioner in 1866.

Pensioner is shown to be entitled to but slight credit by reason of his conflicting testimony. He testified in his invalid claim before the special examiner November 2, 1898, in reference to his marriage to claimant, as follows:

I was first married to Mary Gill in February, 1866, at Manayunk, Philadelphia, Pa., by either Rev. P. A. Nugent or else by a Catholic priest named O'Connor.

I had two children by Mary Gill—Frank, now dead, and Albert. I have forgotten the dates of their birth. I was never divorced from Mary Gill, but left her in 1874.

In a communication to the Bureau December 5, 1901, he stated: "So far as I know I was never married to said Mary Clark." He further alleged that his relations with claimant were illicit and that she deserted him at Hague, Va., in 1875.

On October 28, 1899, he testified that in the year 1867 he was married to Mary Ann Gill and tried to live with her some three years when they separated by reason of her immorality, she saying to him: "You go your way and I will go mine;" that this was in the year 1875 as nearly as he could recall the time.

On January 27, 1900, he testified that after he left Passaic, N. J., in 1873, on account of the conduct of his wife and went to Philadelphia to board his wife followed him, when he went to Hague, Va., where his parents lived; that later his wife followed him there and there was a seeming reconciliation and they lived together until the spring of 1874, when she left him.

On July 22, 1902, he testified as follows:

About the 1st of February, 1866, after my discharge from the Army, on awakening one morning, during a drunken spree with several chums, I found a woman in bed with me, she explained that she was my wife. I had no recollection of any marriage or anything of the sort; but, at the time, as I was neither physically nor mentally in condition to be interested, made no further inquiry, but continued on the drunk and paid no attention to the incident. Later on this woman lived with me intermittently, at intervals of one, two, and three months at a time, when she would take herself off while I was from home at work, carrying with her all we had, and would remain

away for a like or longer period, and until I would, by chance, come up with her again, whereupon she would return to me, remain for another short time, when she would go again. She never said when or where she was going, where she had been, or what she had been doing. This life continued for a number of years.

Late in 1874 I went to the home of my parents in Westmoreland County, Va., during one of the absences of claimant, engaged in building with my father, at Hague, and in the following spring, some six or eight months later, claimant came to Hague, Va., and lived with me in my father's house for a time, as I remember several months, and seemed contented and happy. She was treated kindly by me and by all of my family, and apparently had come to stay. One day in July or August, 1875, while I was absent at my work, she again left my home and deserted me.

* * * * *

In order to get to the truth of the alleged marriage between claimant and me my solicitor communicated with the rector of St. John the Baptist Church, Philadelphia, where it is alleged the marriage was performed, and on getting no reply, visited Philadelphia and the rectory, saw and copied from the marriage record, page 8, of said church, the following, viz: "Feb. 1st, 66—in matrimonium conjunxi Alfordum Clarke et Catheronan Gill a proclamation rete dispensatos. Testes furant Petrus O'Hare et Maria Gill. (Sd.) P. A. Nugent, rector."

Supposing that the women who claimed to have married me knew that she was the party to whom I had been married, and being in ignorance of facts which have since come to my knowledge, I assumed from an inspection of the record that I had been married to "Mary A. Gill," the claimant, by the name of "Catherine Gill," and so charged in my said bill of complaint, but this the said claimant denies, and I am now convinced that I erred in this assumption, and am satisfied I was never married to claimant in any form or by any name.

Peter O'Hara, one of the witnesses named in the church record, testified, May 21, 1903, as follows:

Affiant states that he is personally acquainted with claimant and her husband, and has known them for the last past forty-nine and forty-seven years, and was present at their marriage on February 1, 1866, at St. Johns parochial residence of St. Johns Roman Catholic Church at Manayunk, Philadelphia; they were married by Father Nugent, and affiant acted as groomsmen at the marriage.

Affiant states that he was requested by claimant's husband to act as his groomsmen at the marriage, as they had known each other so long and had been in the same company and regiment during the civil war, and had been boys together.

Affiant states that a few weeks before the marriage claimant's husband, Alfred R. Clarke, told him he was under instructions of the church, preparing for the marriage; and affiant asked claimant's husband to go and take a drink; claimant's husband said he could not, as he dare not go to his affianced's house with the smell of liquor upon him, as she objected to having anything to do with anyone who drank intoxicating liquor; affiant further states that claimant's husband at the time of the marriage to claimant was entirely sober, and, so far as he knew, had not taken any liquor of any kind.

It is evident that pensioner has sought to take advantage of a clerical error in the church record of his marriage to claimant, where the name of claimant's sister Catherine, who was present as a witness, was erroneously inserted, and the name of the bride and the witness were erroneously interchanged, and that by reason of this clerical mistake he has sought to deny his marriage to claimant and to bastardize his children, in order to shield himself from his own wrongful and illegal acts. Not only this, but after his marriage to his second wife, by

whom it appears he has a family of children, he returned to claimant and sought to resume marital relations with her in the latter part of November, 1899, denying that he had remarried, claiming his rights as her husband, and urging his children to persuade their mother to permit him to again cohabit with her as her husband.

Alfred J. Clarke testified before the special examiner at Philadelphia, Pa., April 13, 1903, as follows:

I am a son of Mary A. Clarke, this claimant, and of Alfred R. Clarke, the soldier. I was born in Manayunk, on March 19, 1870, as I have been told and always believed. I have an indistinct recollection of my father as a child. My first and only recollection of him as a child were while we lived in the neighborhood of Broad and South streets. I remember we lived in a small street there near that locality, but I do not remember the name of the street (Kater). I distinctly remember my father being there with us, but I can not remember much of our history there. The next time I ever saw my father was about Thanksgiving time in 1899, when he came to our house where we then resided at No. 2340 Fairhill street. He came there several times during the period of about a week. I came home one day at noon and he was there. My mother told me it was my father. He addressed me as his son and seemed pleased to be there. After that first visit he came there in the evenings when I was free to go out, and I took him out several times and bought him cigars and talked with him about himself. He told me that he had come there for the purpose of making up with mother and that he wanted to live with her again, but he said she did not seem to care for him. He asked me to intercede with mother in his behalf and said if she would live with him he would go and get his tools and we would start in the carpenter business together. He said his tools were down South somewhere, and he said he had come there from Georgia. He said he owned a farm down in Georgia and had been down there all the years he had been away. My mother and father did not talk over their affairs in my presence. He told me that mother had refused to live with him again, but he did not say why she had refused to do so. I told him that we had always heard that he was dead, but that I did not believe it. He said he knew that my mother was not dead. He made no excuses for not returning home before. He said he had started to do so several times but something had happened to prevent it. No; I did not ask him if he had been married again down South. No; I did not hear my mother ask him if he had got married again. He took several meals at the house upon my invitations, and I asked him to come back again on several occasions. No, sir; he did not stay at the house overnight at any time. He told us he was staying at the United States Hotel at Manayunk. No, sir; I did not ask my mother to live with my father again, but I told my mother what he had said to me and that he wanted to come back. She said that she would never live with him again. In fact, I was not in favor of him coming back, because I did not think he had used my mother right at first, and I was satisfied he would not have done right again. Finally, he disappeared and we have not seen him since that time. I have since learned that he was in Washington, although he denied that he had been living in Washington at all. No, sir; I am not married. I have always lived with my mother all my lifetime. She supported and raised us three children and we have always lived together. My older brothers died ten years ago. My sister and I have lived together with mother always. No, sir; my mother has not married again. My mother had always thought that father was dead until she got word from Washington that he was alive. I had never believed that he was dead, however. I always thought he would turn up some day. I had no doubt that his object in coming to get mother to make up with him three years ago was to compromise her in some way so that he could get the

pension again. No, sir; my mother would have nothing to do with him, and he was not invited to remain overnight. In fact, my mother did not invite him to the meals he took in the house. Mother told my sister and I that if we wished to do so we could invite him to meals when he was there, but she would not invite him.

Mrs. Marie Redel testified at same time and place as follows:

I am a daughter of Mary A. Clarke, this claimant, and of Alfred R. Clarke, the soldier. I have been told and always understood that I was born on September 9, 1875, in this city, and I have always understood that my parents were separated prior to my birth. I always understood and believed that father was dead until mother heard to the contrary when she had applied for pension as his widow. I have been married ten years, but I have always lived with my mother ever since I can remember anything, and I am living with her now. She raised me and my two brothers, Francis and Alfred. Francis died about ten years ago. I never saw my father until some time in November, 1899, when he came to our house, No. 2340 Fairhill street, this city. I was not at home when he came there, as I was then working, but when I came home at noon he was there. My mother introduced him to me as my father. He kissed me and called me his daughter, although he said he had never seen me, as I was born after he went away. I knew from my mother the history of his deserting her and going away before my birth. He told us that he had come from some place in the South at that time. He said he had been wandering around from one place to another all the years he had been away from home. I remember that my mother asked him in my presence if he had not been married again, and he denied it. He told me that he came there to get mother to make up with him, and that if she would live with him again he would do better. He offered to take me out West with him if I would go. His idea was to take me on a pleasure trip. I told him I would go with him, but he left the next day and I have not seen him since.

Yes, sir; I heard father coaxing mother to live with him again, but she said she would not live with him again. No, sir; we did not know when he was there that he was married again, but mother learned it afterwards. No, sir; we never knew or heard that my father was living until my mother got notice from the Pension Bureau to that effect. I always supposed that he was dead, but we had no proof of the fact. My father said that he owned some property down South, but I do not remember if he said whereabouts he owned the property. He took several meals at the house and was there several times in the evenings, but he never remained there over night, nor would my mother have anything to do with him. He coaxed and tried to persuade mother to live with him again, but she refused to do so. No, sir; my mother has never remarried in all the years my father was away. We children have always been with her and had our homes together. My mother has no property or means of any kind; she is entirely dependent upon her daily labor for support, with the help that my brother and I give her. Her eyesight has nearly failed her, so that she can not do the work she formerly could. No, sir; my father has not written to me or any of the rest of us since he was here three years ago, and he had never written to any of us in all the years he was away. I heard him say that he knew mother was not dead, but he did not say how he knew the fact. He said he heard of my brother Francis's death when it occurred, and he said he always knew that he had a daughter living. When I was a child I used to visit my Aunt Emily (Mrs. Bartle), and I have asked her many times if she knew what became of my father, but she always turned the subject in some way. I remember that she used to tell me that I looked very much like my father. When my brother died Uncle Edgar Clarke, my father's brother, attended the funeral, as also did his sister, Mrs. Emily Bartle. Since my father's visit I have had a different opinion of him than I had before. He said he was going to send South and get his tools and come here to live, but so far I know he has not done so.

The testimony of the two foregoing witnesses is also corroborated by other reputable witnesses who, however, fix the time of his visit as about Thanksgiving, 1900, instead of 1899. This, however, is but an immaterial variance. Whether it was in 1899 or 1900 the obloquy of his conduct remains, and adds another refutation to his testimony and contention that he was never married to claimant.

Claimant, having been deserted by her husband, was entitled to her separate domicile. His marital duty required him to return to her in order to terminate the period of his desertion, and if upon his return to her domicile with the offer to resume marital relations she was legally justified in refusing to accept his offer, she is not chargeable with desertion by reason of such refusal. *Kendall v. Kendall* (14 P. D., 159); *Byrns v. Byrns* (Ibid., 404); *Calvin v. Reed* (55 Pa. St., 375); *Williamsport v. Eldred* (84 Pa. St., 429-432.)

It is evident from the testimony of reputable witnesses, as well as pensioner's own admission, that claimant's visit to her husband at Hague, Va., was prior to their removal to Passaic, N. J., and prior to his desertion of her in Philadelphia, Pa., in July, 1875. Whatever offense she committed, if any, in leaving her husband at Hague, Va., was subsequently condoned by their cohabitation at Passaic, N. J., and Philadelphia, Pa. So, also, the fact that there is no official record of the marriage of claimant and pensioner, as required by the laws of Pennsylvania, does not affect the validity of the marriage merely because the law as to the recording of the marriage is not complied with. At most it could only raise an adverse rebuttable presumption, which, in this case, is outweighed by proof of marriage in fact. Even if there had been no marriage ceremony the evidence establishes a valid common-law marriage under the laws of Pennsylvania.

The fact that pensioner's suit against claimant for divorce, commenced in 1900, is still pending, affords no sufficient reason for further delaying the consideration of his appeal or directing further special examination.

The Bureau action appealed from, as well as the action subsequent to the last special examination, appears to have been fully justified by the evidence in the case and said action is accordingly affirmed.

LIMITATION—ACT MARCH 3, 1879—ORPHAN BROTHERS AND SISTERS.

MARY C. FLEMING, FORMERLY BASSETT (AS MINOR SISTER).

The proviso to the act of March 3, 1879, excepting from the limitation therein prescribed as to date of filing "claims by or in behalf of insane persons and children under 16 years of age" does not apply to claims of orphan brothers and sisters. Minor sisters of Alexander Sutton (8 P. D., 137); Lucy Hunt (9 P. D., 160); dependent sister of William A. Baker (ibid., 504).

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 14, 1904.*

The appellant, Mary C. Fleming (formerly Bassett), filed on October 2, 1888, a claim for pension as the dependent sister of James Bassett, deceased, who enlisted as a private in Company C, Forty-ninth Indiana Infantry, on October 26, 1861, and was killed in action near Port Hudson, Miss., May 1, 1863. Said claim was rejected in August, 1897, on the ground that as the claim was not filed until after July 1, 1880, and the claimant was then over 16 years of age, having been born in 1860, there was no period during which she could be pensioned. From that action an appeal was taken April 20, 1904, the contention being that as the claimant was a child under 16 years of age when the right to pension accrued, she is exempted from the limitation as to filing contained in the act of March 3, 1879, and is entitled to pension from the date of the death of the person having the prior right, regardless of the date of making application.

This question has been fully considered by the Department before and the holding has been adverse to the appellant's contention. In the case of the minor sisters of Alexander Sutton (8 P. D., 137) it was said:

The grant in section 4707, upon which this claim rests, is made to orphan brothers and sisters under 16 years of age, subject to the other conditions therein. In a general sense these brothers and sisters are children, but they are not granted pensions in that relation. They derive pension through the soldier not as "children" of anyone, but as his "orphan brothers and sisters," and it is in the latter relation only that the law gives them the right to pension. None but the children of the soldier himself are pensioned as "children." In every instance where the clause "children under 16 years of age" is used in the pension laws the reference is uniformly (save in the act of March 2, 1895) to the children of the soldier and to no others.

It would seem that the claims of a soldier's orphan brothers and sisters are within the reason of the law which except those filed by or in behalf of a soldier's own children from the limitation of the second section of the act of March 3, 1879; but likewise, it may be urged, are the claims of children and insane persons under the act of June 27, 1890, as to the limitation therein concerning the commencement of pension. But Congress has not seen fit to act upon this reason and remove the limitations in any claims except those specified in said second section. This Department can only execute the law as it is, and according to its intent as gathered from the language of the law itself. The claims of orphan brothers and sisters are not believed to be included within the exception above indicated.

The decision in the Sutton case was affirmed in the case of Lucy Hunt (9 P. D., 160) and again in the case of the dependent sister of William A. Baker (*ibid.*, 504).

The brief argument submitted by the appellant in this case presents no points that were not considered in the cases above referred to, and there seems to be no good reason for further discussion of the question at issue.

The action appealed from is affirmed.

MARRIAGE—SLAVES—LAWS OF MISSOURI—EVIDENCE.

MINORS OF JOHN BLUFORD.

A slave marriage was absolutely void in Missouri unless ratified subsequent to emancipation of the parties.

The question of ratification of such a marriage is one of fact, to be determined from all the facts, circumstances, and conditions in the case, as shown by the evidence.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 14, 1904.*

On September 22, 1890, Paul Gaston, as guardian of Ida and Teresa Bluford, minors, filed this claim (No. 463139) for pension under the act of June 27, 1890, on account of the service of John Bluford, father of said minors, formerly of Company I, Sixty-fifth U. S. Colored Volunteer Infantry, and deceased December 12, 1883, as alleged.

Said claim was rejected January 3, 1903, on the ground that the evidence shows that at the date of soldier's marriage to said minors' mother, February 8, 1868, he had a living and undivorced wife; that such marriage, therefore, was invalid and void, and that they, said minors, are accordingly not legitimate and are not pensionable.

In this appeal, filed January 21, 1903, the prior marriage of the soldier as a slave is admitted; also, that he and his former slave wife cohabited for a while after their emancipation; but it is contended no valid marriage between them ever existed because they failed to conform to the requirements of the act of February 20, 1865, of the legislature of Missouri, where they resided; and, therefore, that such prior supposed marriage of soldier constituted no impediment in law to his said marriage to the mother of these minors.

Said minors' mother died, as alleged, in 1890, without having filed any claim for pension. On September 13, 1879, however, the soldier's alleged slave wife filed a claim as his widow, which was rejected January 3, 1903, on the ground that her conduct since August 7, 1882, had been such as to forfeit, under the provisions of the act of that date, her title to pension as such widow, and that his fatal disease originated prior to his enlistment, as shown by the records of the War Department.

Said widow claimant testifies on special examination that she and soldier were ceremonially married as slaves March 20, 1859, near Paris, Mo., and cohabited as slaves, bearing three children, up to his enlistment; that they corresponded during his service, and on his discharge, November 20, 1864, he returned to her in Paris, about three weeks before Christmas of that year; that he was then, and remained for some time, sick, and on recovery went to Hannibal, Mo., rented a house, and sent for her; that she went there about February 9, 1865, and lived with him as his wife until October, 1865, when he left her,

for no reason she knows of, unless it was her dark color, he being proud of his light color and his captain having told him he should have a light woman; that he went to Galesburg, Ill., and she "followed him up and made it hot for him," but "he got out of her reach there" and she returned to Hannibal; that on hearing of his return to Galesburg she again went there and remained, with her child, for seven or eight months, but did not live with him as husband and wife, and she then returned to Hannibal, where she has since resided, and where on September 7, 1875, as shown also of record, she married Louis Wilson, with whom she lived until his death in 1895.

A week after his marriage to these minors' mother, also shown of record, in New London, Ralls County, Mo., he came to Hannibal and lived there until his death, his children by her associating with his by said former slave wife, all the latter of whom were born prior to his enlistment. Said former slave wife testified she was persuaded by her friends not to prosecute him for bigamy, when he returned to Hannibal; that she never heard he claimed she was not his wife, because they were not remarried as provided in said act of February 20, 1865, "if there is such act," she says; and that on his deathbed he sent for her and asked if she had anything against him, when she told him if he was at peace with God, she was with him.

The only other witness is the sister of this former slave wife, who corroborates the latter as to the fact of a slave marriage and substantially, as to cohabitation, as husband and wife, up to enlistment and after service.

Her sister, she says, was living with her and her husband in Paris, Mo., when the soldier returned from service, and he came to their house and remained there until she and her husband went to Hannibal; that the soldier then sent money to her sister to come to him and they went there about February 10, 1865; that her sister and soldier lived together at Hannibal as husband and wife for three or four months, when he went to Galesburg "to do better" and to see an aunt, and her sister followed him, "but not on his invitation."

The testimony in this case is exceedingly meager, but the facts as testified to are sufficient for the proper disposition of the appealed claim. The only question is, as to the legitimacy of these minors, which depends alone upon the validity, under the laws of the State of Missouri, of the marriage between their parents on February 8, 1868, in that State, which question as to validity of that marriage depends in turn upon the validity of the alleged prior marriage to the widow claimant.

In the case of *Johnson v. Johnson* (45 Mo., 595) the supreme court of Missouri held that a slave marriage was "absolutely void in legal contemplation," but that its moral standing was such that, analogous to the marriage of a party under the age of legal consent, or to that

of an insane person, it could or might be ratified after emancipation of the parties to such slave marriage, the same as the ratification of a marriage under age or insanity or other disability after the removal of such disability.

In that case a slave was married to a free woman in 1849; he was freed in 1850, and continued to live with her until 1863, when she sued for divorce, and the court held—

that as the appellant, when he was emancipated, continued to live and cohabit with the respondent, and constantly acknowledged her as his wife, the marriage should be recognized and deemed valid.

It is noted that the controlling fact in that case was the constant acknowledgment by the husband of the wife for thirteen years, a fact which markedly distinguishes that case from this, in which there was no such prolonged acknowledgment subsequent to his emancipation by the soldier of his former slave wife as to characterize such acknowledgment as "constant," but, on the contrary, he, within a very few months, left her, refused twice subsequently on her importunities to renew marital relations with her, and a few years later remarried and removed to the town wherein she resided, and where she not only made no objection during his or her subsequent residence there of eleven years, to his living with the one whom he brought there as his wife, but she herself remarried, impliedly admitting no marital relation then existed between her and him.

These facts alone are sufficient to show that the soldier repudiated after his emancipation any legal marriage with his slave wife. But there is further and stronger significance in his conduct in its relation to the act of February 20, 1865, above mentioned, which provided:

(1) That in all cases where persons of color heretofore held as slaves in the State of Missouri have cohabited together as husband and wife, it shall be the duty of persons thus cohabiting to appear before a justice of the peace of the township where they reside, or before any officer authorized to perform the ceremony of marriage, and it shall be the duty of such officer to join in marriage the persons thus applying and to keep a record of the same.

* * * * *

(6) Free persons of color living or cohabiting together as husband and wife without being married according to the provisions of this act, after twelve months from its passage, shall be liable to criminal prosecution: *Provided, however,* That this section shall not extend to colored persons who have enlisted in the service of the United States or State of Missouri, who shall not be subjected to any penalty for its violation until six months after their discharge from said service.

It must be presumed that all citizens of that State had knowledge of this act of the Missouri legislature requiring that colored persons, former slaves, should formally marry within twelve months after the passage of said act, under penalty for failure so to marry. Special significance, therefore, attaches to the soldier's desertion of his former slave wife at the time he did, very shortly, only, before the expiration

of the period within which he must formally marry her or be liable to prosecution for unlawful cohabitation. The only alternative was to leave her, and the fact that he did imports strongly that he did not intend lawful marriage with her.

Her own conduct also tends to show that there was no mutual marital intent in their subsequent cohabitation. She, doubtless, wished to become his lawful wife, but on his refusal to marry her she acquiesced, made no attempt to prosecute him, and herself remarried. The irresistible conclusion from all these facts and circumstances is that there was no ratification in fact, after their emancipation, of the slave marriage between them, and there was, therefore, under the decision in the case of *Johnson v. Johnson* (supra) no valid marriage at any time between the two, and their relations constituted no bar to his marriage to the mother of these minors. The latter was, accordingly, a valid marriage and they are legitimate children of the soldier.

The action appealed from is reversed, and you will readjudicate the appealed claim in accordance with the foregoing.

SERVICE—LENGTH OF SERVICE—TRAVEL PAY.

SUSAN F. ALSUP, ALIAS BEAN (WIDOW).

Travel pay allowed the soldier to and from the point of rendezvous was not pay for actual military service, but was pay for time and expenses allowed recruits and discharged soldiers, and precludes their being considered as in actual military service during the time they were actually entitled to receive it.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 14, 1904.*

Susan F. Alsup filed a claim, No. 7143, May 10, 1897, for pension under the act of July 27, 1892, as the widow of Elijah Alsup, who served under the name of Elijah Bean in Captain Loyall's Company, Second Georgia Volunteers, Creek war. The claim was rejected October 4, 1897, on the ground that the soldier did not serve the requisite thirty days as shown by the report of the War Department.

The recognized attorney appealed from this action January 17, 1903, contending that on a basis of one day's service for every 20 miles of travel to and from his home the claimant would be entitled to pension.

The records of the War Department show that the soldier was enrolled at Columbus, Ga., June 9, 1836, and mustered out with company July 7, 1836, at Columbus, Ga. The records of the Auditor for the War Department show that he was allowed twelve days' travel pay. Evidently the place of rendezvous for the company in which the soldier served was Columbus, Ga., where he was enrolled and mustered out.

Section 1651, Revised Statutes, provides that when the militia is called into actual service their pay shall be deemed to commence from the day of their appearing at the place of battalion, regimental, or brigade rendezvous.

Outside of the period of service indicated by the rolls on file in the War Department, the Government of the United States had no jurisdiction over the soldier from the date he was mustered out of the service with his company, and pay allowed for expenses by travel, etc., after his discharge from the service can not, under the law, be considered as pay for service as a soldier.

In the case of David J. Bailey (7 P. D., 173), the Department held:

Under the provisions of the act of July 27, 1892, period of service commences from the date when a claimant appeared at the place of battalion, regimental, or brigade rendezvous designated in proper orders, and ends at the date when he reaches said rendezvous on his return, or (sec. 4701, Rev. Stat.) the date of individual discharge, or the date when the organization to which he belonged was disbanded. (*Houston v. Moore* 5 Wheaton, 4 U. S. R., 535.)

So, in the case of Catherine Waters (9 P. D., 206), the Department, in discussing the question at issue, said among other things:

The facts shown by the records are conclusive upon this Department as to the length of service rendered by the soldier in the Florida war, which in this case is seven days' actual service.

The travel pay allowed the soldier to and from the point of rendezvous was not pay for actual military service, but was pay for time and expenses allowed recruits and discharged soldiers, and precludes their being considered as in military service during the time they were entitled to receive it.

In harmony with these decisions the Department feels constrained to hold that the claimant is not entitled to pension under the act of July 27, 1892, for the reason that the soldier did not serve the required thirty days.

The action appealed from is affirmed.

LINE OF DUTY—SENILE CATARACT.

JEREMIAH BOWMAN.

A disability due to senile cataract is not pensionable under the general law as construed by the Attorney-General (7 Op., 149), because the same is not due to the service in line of duty.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 14, 1904.*

This appellant, Jeremiah Bowman, was in the Regular Army, under successive reenlistments, from January 25, 1875, to January 24, 1902, being finally discharged from Company B, Twenty-fourth U. S. Infantry, because of senile cataract of both eyes.

His claim for pension, filed January 29, 1902, on account of loss of vision, was rejected January 2, 1903, on the ground that said disability was not due to his military service; and he appealed January 21, 1903, contending that it is most unjust to reject such a claim after a soldier has served so long and the disability actually arose in service.

Whatever injustice may appear in such or any case, the Department can only decide the case under and in accordance with the laws of Congress establishing title to pension and the settled practice of the Department under such laws as construed by the Department. The law is positive and clear that a cause of disability, to be pensionable, must be appurtenant to, dependent upon, or connected with acts within the line of duty in service. This has been construed by the Attorney-General of the United States (Attorney-General Cushing in 1855, 7 Op., 149) as follows:

To determine the right of pension the question is not whether, when the cause of disability or death occurred, the party was on duty or not in active service, or on furlough or leave, in arrest or not, but whether, in any of the possible conditions of service, the cause of disability or death was appurtenant to, dependent upon, or connected with acts without or acts within the line of duty.

And he states in this opinion, very appositely to this claimant's case, that—

Neither the bad man who dies of his incorrigible vices, nor the good man who, at the full maturity of blameless life, dies in the course of nature of any of the maladies incident to old age, can be said to die of "disease contracted while in the line of duty."

• And he continues:

In fine, the phrase "line of duty" is an apt one, to note that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, injury, or the disease producing disability or death.

These rules, carefully evolved and enunciated by the highest legal official of the National Government nearly 50 years ago have remained in force ever since, and comment thereon is unnecessary.

It is obvious that, under the law as thus construed and applied for many years, this claimant is not pensionable on account of senile cataract—a disease wholly disconnected with his military service and of no possible causative or sequential pathological relationship whatever therewith.

No other holding is possible under the law, and the claimant's only recourse, as to the alleged injustice in his case, is to Congress itself. The Department can only, as above stated, apply the law as it finds it. The rejection of this claim must, therefore, be affirmed.

MARRIAGE—DIVORCE—EVIDENCE—PRESUMPTION—ACT JUNE 27, 1890.

ANNIE P. RYERSON (WIDOW).

Soldier married Elizabeth P. Osman, about 1855, with whom he lived until she ran away with one Welch, while soldier was in the service. Elizabeth has been unheard of for many years.

Soldier married claimant in 1868, and they lived together as man and wife continuously until his death, in July, 1897.

While no divorce between soldier and Elizabeth has been shown by primary evidence, yet under the decisions of courts in Missouri, where these parties resided, a divorce will be presumed in favor of the validity of the second marriage. (See case of Letitia C. A. Spencer, 13 P. D., 68.) Case of Theresia Schreve (9 P. D., 78) overruled.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, April 15, 1904.

Annie P. Ryerson, as widow of Alphonso F. Ryerson, formerly a saddler in Company K, First Regiment Illinois Volunteer Cavalry, filed her declaration for a widow's pension under the act of June 27, 1890, on July 22, 1897. The claim was rejected June 6, 1900, on the ground that the claimant had failed to establish title as the legal widow of the soldier, and from this action the claimant, through her attorney, filed an appeal July 20, 1900.

The issue in the case is as to the legality of the marriage of soldier and claimant. The evidence shows that they were married by ceremony in conformity with the laws of the State of Missouri, November 26, 1868, and lived and cohabited together as man and wife until the date of the soldier's death, July 14, 1897, five children having been born of the union.

When this claimant filed her declaration for pension, she stated that the soldier had been previously married, but that he had secured a divorce from his first wife.

The evidence shows that about 1855 the soldier married Elizabeth P. Osman, at New Buffalo, Mich., and subsequently moved to Pecatonica, Ill., where they resided until the soldier enlisted in the First Illinois Volunteer Cavalry. During his absence his wife became intimate with a married man named Welch, and she finally deserted her home and three small children and eloped with him. The soldier returned home on a furlough and secured temporary homes for his children and then returned to the service. Although this case has been subjected to a careful investigation by special examination, no court record of the soldier's divorce from his first wife can be found.

The claimant testified before the special examiner that she knew nothing whatever as to her husband's first marriage, or his life or acquaintances before she met him, except from statements made by him; that he told her he was divorced from his first wife, and that

before they were married the matter was looked up by her brother-in-law, Joseph H. Alexander, who was the cashier in the bank in St. Charles, Mo., and that when he ascertained that the soldier had been divorced she married him; that she remembers that her brother-in-law wrote to a man named Vandercook, in Pecatonica, Ill., and the reply received was satisfactory; that she also remembers that the soldier had a lawyer named George McFarland, who lived in Mexico, Mo., look up the divorce matter, and as Mr. McFarland was a particular friend of her family she knows that he never would have permitted her to be imposed upon, and that McFarland was afterwards a supreme court judge in Missouri.

The special examiner certified that the claimant's reputation and character are above reproach.

Joseph H. Alexander testified before the examiner March 11, 1899, that he was the cashier of the Union Savings Bank at St. Charles, Mo., and a brother-in-law of the claimant; that she wrote him prior to her marriage asking him to make inquiries relative to the soldier's former marriage and divorce; that pursuant to such request he wrote to several gentlemen whose names she gave him, and the replies she received satisfied him, and all parties concerned, that the soldier was not only entitled to a divorce but had actually received it, and was free to marry again; that deponent had forgotten the names of the parties to whom he wrote at that time, and he did not keep a copy of the letters; that when the claimant applied for a pension he made further inquiries as to the record of the soldier's first marriage and as to his divorce; that he wrote to prominent lawyers and clerks of the court in Winnebago County, Ill., Elkhart and Laporte counties, Ind., and Berrien County, Mich., but could not find any record to establish either his first marriage or his divorce.

Benjamin B. Turemen testifies that the soldier and claimant were both members of his church and that they lived together as man and wife up to the time of soldier's death.

Alice O. McFarland testified that she heard that the soldier was divorced from his first wife, and this information she received from her husband who was an intimate friend of the soldier.

The special examiner certified that Joseph H. Alexander was one of the best-known citizens of St. Charles, Mo., and his reputation for truth had never been questioned. That the other witnesses bear the best of reputations in Mexico, Mo., and all speak very highly of the claimant.

C. C. Stevens, of Pecatonica, Ill., testified that the soldier lived with his first wife in that place, and that his wife deserted her family when the soldier was in the service and ran away with a man named Welch; that after a time Welch returned and then went away again, but that the soldier's wife never came back; that deponent heard after

she left that she was in a house of prostitution in Chicago; that he never knew or heard that the soldier applied for or secured a divorce.

Mrs. H. E. Vandercook testified that her husband worked with the soldier in the saddlery business in Michigan City, Ind., before the war, and the soldier married a woman named Elizabeth Pendel; that after the woman ran away the soldier's son, George, lived with her for a number of years; that she never heard from the woman afterwards except that she heard the son say that he thought his mother died in Springfield, Ill.; that deponent is satisfied that the soldier secured a divorce from his first wife, but she can not state when or where.

Julia Golly testified as to the soldier's first wife running away, and that she never knew of her whereabouts afterwards; that if she was alive she would be about 65 years old, and that she heard the soldier's son, George, say that he thought his mother was dead.

The special examiner certified that he had made a diligent inquiry, but had failed to learn what became of the first wife, and no one knew whether or not the soldier ever applied for a divorce, and that the clerks of the circuit courts in Winnebago and Stephenson counties certified that they failed to find any record of a divorce.

Mrs. Lucy E. Sherman, of Denver, Colo., and a cousin of the soldier, testified that she formerly resided near Pecatonica, Ill., and that after the soldier's wife ran away she heard from her once, and she then returned a ring that she had borrowed from her.

Augustus G. Ryerson, of Denver, Colo., and son of the soldier by his first wife, testified that he was a child when his mother went away; that he had supposed that she was dead, but three or four years previous he visited his father at Mexico, Mo., and that his father said that the last he heard from her she was living at Bloomington or Springfield.

Mrs. Amanda J. Fields, of San Francisco, Cal., a sister of the soldier, testified as to his first wife running away, and that after her brother returned from the war he went to Mexico, Mo.; that deponent was then living in Milwaukee, Wis.; that he visited her and told her that he had been to Pecatonica, Ill., to get a divorce so that he could marry again; that later she heard he was married; that twenty or thirty years ago she received a letter from the soldier's first wife asking for help, but she never answered the letter and she never heard from her, or of her, since that time.

Kate M. Sabin, of Vancouver, Oreg., testified that she resided with her mother at Pecatonica, Ill., at the time the soldier's first wife went away, and that his youngest child, Eddie, was cared for by her mother; that for two or three years after his first wife left she would write asking about the children and then the letters ceased, and deponent had not heard from her since.

While the greater portion of the evidence filed in this claim is hearsay in character, still the evidence clearly establishes the fact that prior to the soldier's second marriage the question of divorce from his first wife was considered and investigated. The evidence also shows that this claimant was an intelligent woman and had intelligent and influential friends interested in her behalf. Her brother-in-law, Joseph H. Alexander, states positively that he satisfied himself that a decree of divorce had been granted and Mrs. Fields testified that the soldier while visiting her at Milwaukee, told her that he had been to Pocatonia to secure a divorce. Mrs. Fields may be mistaken as to the place and the soldier may have secured a divorce before some other court.

The evidence as to divorce is just as strong and entitled to the same weight as the evidence to show that the soldier was married prior to his union with the claimant.

The soldier and claimant were united by ceremonial marriage and cohabited and lived together as man and wife continuously for a period of twenty-eight years, and this is the first time that a question has been raised as to the legality of said marriage, or the legitimacy of her children. The evidence shows that the soldier was unquestionably entitled to a divorce from his first wife. It is hardly fair or reasonable under the circumstances to suppose that he would have neglected to procure one before contracting marriage with the claimant, or that the claimant would have been allowed by her friends to enter into an illegal marriage.

The status of the appellant was created by the laws of the State of Missouri at the time she became the wife of the soldier. She comes before the Department with affirmative proof of that status in the shape of a certified record of her marriage. She cohabited with the soldier, reared a family of children, and they were recognized by all their acquaintances as man and wife for a period of over twenty-eight years. She and her friends have made diligent effort to find when and where the divorce decree was granted, but their efforts were not successful.

It is not essential that she should prove by primary evidence that such a decree was granted, according to the law of Missouri. See case of Mollie Rich (4 P. D., 234).

The facts in this case closely resemble those in the case of Leonard and Margaret Klein *v.* Jacob and Christina Laudman (29 Mo., 259), cited in the departmental decision in the case of Letitia C. A. Spencer (13 P. D., 68). That was an action for slanderous words spoken about the plaintiff, Margaret, by defendants. The slander was proven, but the defendants denied that plaintiffs were husband and wife as alleged, basing the denial upon a declaration made by Margaret to the effect that previous to her marriage to Leonard she had been married to

another person in Germany. This was admitted by Margaret, who sought to introduce parol evidence showing that said first marriage had been legally annulled and dissolved in Germany previous to the marriage of plaintiffs.

The court below refused to admit this testimony and instructed the jury, at the instance of defendants, as follows:

If the jury find from the evidence that the plaintiff, Margaret Klein, was married in Germany to another person than Leonard Klein, the plaintiff, then such relation is presumed to continue; and it devolves upon the plaintiffs to prove to the satisfaction of the jury that such marriage was legally terminated before the date of the marriage certificate, read in evidence, or they can not recover.

This the supreme court of Missouri declared to be error. The greater part of the opinion upon this phase of the case has been quoted in the case of Letitia C. A. Spencer, *supra*. In addition the court also said:

There was no proof that her first husband was living; and if there had been, the woman was still entitled to the charitable presumption that a divorce from her first husband had enabled her to marry a second time.

The attitude of Missouri courts similar to the claim on appeal, is stated in a syllabus in *Klein v. Laudman*:

A and B as husband and wife sued C in an action of slander for words spoken. They proved their marriage. Declarations made by the wife B to the effect that previous to her marriage to A she had been married in Germany to another man, were admitted in evidence in favor of C to show the marriage with A invalid. Held, that the law under such circumstances would presume in favor of the innocence of B in contracting the second marriage; that the first marriage had been dissolved by death or decree of divorce.

So in this case Annie shows a formal marriage with Alphonso. Years prior to this marriage Alphonso, it is said, had a wife, Elizabeth, in another State, who left him years ago under circumstances to which a presumption of death might attach. But even if it had been shown that Elizabeth was alive at the time of his marriage to Annie, the courts of Missouri would presume that the first union had been dissolved by divorce in order to maintain the validity of the last marriage.

That portion of the above case relating to presumption of divorce was quoted by a Missouri court in a later decision in the case of *Waddingham v. Waddingham* (21 Mo. Ap., 609). The *Waddingham* case was a suit for nullity.

It is certain, then, as concluded in the case of Letitia C. A. Spencer, that in Missouri divorce from a prior marriage will be presumed in order to sustain a subsequent marriage.

In the case at bar there is not the slightest bit of evidence tending to rebut the favorable presumption.

It is therefore held that, according to the law of Missouri, claimant is the widow of the soldier, and as such is entitled to the benefit of

the act of June 27, 1890. The action appealed from is reversed. The papers are herewith returned.

The case of Theresia Schreve (9 P. D., 78), so far as it may conflict herewith, is hereby overruled.

SERVICE—DESERTION—JOINT RESOLUTION OF JULY 1, 1902—FAITHFUL SERVICE.

FANNY STUART (WIDOW).

In establishing, under the joint resolution of July 1, 1902, a soldier's faithful entire last service, from which he was discharged, after removal of a charge of desertion, under the act of July 5, 1884, such discharge is not necessarily evidence of the faithfulness of such service; but when granted upon proof of faithful service to May 1, 1865, as provided in that act, and dated on the date so charged with desertion, such a record of desertion is prima facie evidence of unfaithfulness, and a claimant must produce evidence satisfactorily disproving such charge, and showing that such soldier did not, in fact, desert.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 21, 1902.

This appellant, Fanny Stuart, on May 23 and September 11, 1902, filed declarations claiming pension under the acts of June 27, 1890, and May 9, 1900, as widow of Richard Stuart, alias Chaplin, formerly of Company I, Twenty-first U. S. Colored Volunteer Infantry, and deceased July 3, 1894.

Said claim, No. 599406, was rejected July 23, 1903, on the ground that the soldier was a deserter from his first service, in the Navy, and "did not faithfully perform his duties during his second term of enlistment, as stipulated in the joint resolution of July 1, 1902."

In this appeal, filed April 20, 1904, it is contended that the charge of desertion from the soldier's naval service has been removed, and that he should be considered as having served faithfully during that service.

The appeal mistakes the charge of desertion, which has been removed in this case. It was not such charge as to his naval service which was removed, but that from his subsequent service in said Company I, Twenty-first U. S. Colored Volunteer Infantry, which was removed in 1889 under the act of July 5, 1884. The charge of his desertion from his naval service still stands against him, and in order to remove, for pensionable purposes, this standing bar to pension under the act of June 27, 1890, the joint resolution of July 1, 1902, is invoked, said joint resolution providing that any enlisted or appointed man who was honorably discharged from his last contract of service during the war of the rebellion—

shall be held and considered to have been honorably discharged from all similar contracts of service previously entered into by him with the United States during

said war: *Provided*, That such enlisted or appointed man served not less than six months under said last enlistment or appointment, that his entire service under said last enlistment or appointment was faithful, and that * * *

It is evident that this soldier's entire service under his last enlistment is held herein not to have been faithful, because of the former charge of desertion from that service of record against him. But as this charge has been by law removed from the record, there would appear to be herein no evidence whatever of any unfaithfulness in such service, the only evidence of such ever in the case being the former record.

Upon what proof, under the act of July 5, 1884, said charge was removed is not stated, but the facts in the case show it must have been upon proof of faithful service to May 1, 1865, that being the only one of the several conditions in fact therein prescribed as entitling to such removal which existed herein.

That act provides for such removal—

in all cases where it shall be made to appear to the satisfaction of the Secretary of War, from such rolls and records, or from other satisfactory testimony, that any such soldier served faithfully until the expiration of his term of enlistment, or until the first day of May, A. D. 1865, having previously served six months or more, or was prevented from completing his term of service by reason of wounds received or disease contracted in the line of duty, but who, by reason of absence from his command at the time the same was mustered out, failed to be mustered out and to receive an honorable discharge: *Provided*, That no soldier shall be relieved under this section who, not being sick or wounded, left his command without proper authority whilst the same was in the presence of the enemy.

As this soldier's discharge, issued under that act, was dated September 22, 1865, the date upon which the record originally charges he deserted, while his organization was not mustered out until April 25, 1866, it is apparent such charge was not removed upon proof that he served faithfully to the expiration of his term of enlistment. And as he never alleged incurrence in service, at or about the time he was charged to have deserted, of any disability, the only disability of service origin alleged by him, in a claim filed April 26, 1889, being a bone felon on his right hand in April, 1865, it is equally apparent that such removal of the charge of desertion was not based upon proof that he failed to be mustered out with his organization, because of a disability which prevented his presence at the muster out of said organization.

Had such removal of said charge been for either of these causes, his discharge would not have been dated as it was, but would have been dated on the same date as the muster out of his organization; for both of these causes implied necessarily faithful service to date of muster out of the organization, in reality proof that the charge of desertion was not true in fact.

The only other proof, therefore, which could have been made to entitle, under the act, to removal of said charge, was proof of faithful

six months' service prior to May 1, 1865, and this proof was, it is obvious from the record itself, that upon which such charge was in fact removed, and as this proof did not cover the entire period of the last service the removal of said charge can not be taken as a finding in fact that the "entire service under the last enlistment or appointment was faithful," a prerequisite condition entitling, under said joint resolution, to a holding of an honorable discharge from his prior contract of service in the Navy.

The case rests alone, therefore, upon the determination of the question whether this soldier's service from May 1, 1865, to September 22, 1865, the date he stands as discharged, was faithful. This is a question of fact, determinable from all the facts, circumstances, and conditions in the case, as shown by the evidence.

It is obvious that a discharge issued under the act of July 5, 1884, because of faithful service to May 1, 1865, can not be viewed in the same light or have the same legal effect as to a presumption therefrom as to the character of the service from which so discharged, as one issued under said act because of faithful service to the expiration of the term of that enlistment or because of a disability preventing muster out with the organization.

Those two causes show an entire service faithful in fact, and a discharge issued under that act for either of those causes might well be taken as presumptive if not conclusive evidence, under said joint resolution, of a faithful entire service from which the soldier was so discharged.

As to the first cause, however, the entire service up to date of discharge as issued under said act not being shown in fact as faithful, no such presumption in fact, whatever presumption in law might result, may be held to arise from such discharge as to the character of the entire service. As stated above the question as to the character of such service after May 1, 1865, is one of fact, as to which there is no presumption arising under or from a discharge issued under that act.

The question, then, in the determination under said joint resolution of the faithfulness of the entire service of one who was thus discharged under the act of July 5, 1884, is as to what effect, if any, such former record as to the charge of desertion thus removed has. Has it any effect at all, and if it has, is it conclusive as to the unfaithfulness indicated by such a charge, or only presumptive evidence thereof subject to be overcome by proof that said charge was untrue in fact.

While said charge has been removed from the record and no longer exists, the fact that it once existed and was entered of record by the company officers in the discharge of their duty at or about the time the soldier was last in service can not be disregarded any more than could be the fact of the existence at a certain time of a law which has since been repealed. It is part of the *res gestae* of his service that he was then charged of record with desertion, and the removal under

the act of July 5, 1884, of such charge can not be accepted as of any effect to disprove such charge, because such removal was based, not upon the merits of the question as to the fact of desertion, but solely upon the statutory condition that he had served faithfully to May 1, 1865. The adjudication herein, under the act of July 5, 1884, did not go at all to the question of desertion or no desertion. That was not an issue or involved in the issue under such adjudication.

Under the joint resolution of July 1, 1902, however, the question or issue is as to the faithfulness of the soldier's entire service under that enlistment, and upon such question or issue all the *res gestae* of that service, the facts, circumstances, and conditions then existing, are competent, relevant, and material to be considered in determining that question or issue. One of these is unquestionably the fact that the company officers entered of record at that time the charge of desertion, and in order to show under said joint resolution his faithfulness during that entire service he must necessarily disprove such charge; the same as, under the two other provisions of the act of July 5, 1884, he must necessarily do in establishing faithful service to the expiration of his term of enlistment, or the existence at the charged desertion and at muster out of the organization of a disability incurred in line of duty and preventing him from being present at such muster out.

The former record of desertion has, therefore, effect as part of the *res gestae* of the soldier's service, but it can not be accepted as conclusive evidence of such desertion, because to so accept it would result in defeating the plain provision of said joint resolution that on proof of, among several things, a faithful entire service he shall be entitled to the benefits of said joint resolution.

A soldier is by this joint resolution accorded and given the right to show his entire service was faithful. If the former record as to his desertion be taken as conclusive of the fact, it results in denying to him the right thus given him by said joint resolution to show the faithfulness of such service. Congress must necessarily therefore have intended such record should not be so conclusive, but should be subject to be overcome by evidence disproving said charge. Such record stands merely as *prima facie* an adverse fact in the consideration of the question under said joint resolution of the faithfulness of the entire service, which may be overcome or disproven by other evidence.

Another reason for holding such record only *prima facie* adverse as evidencing desertion is that it is a record of a mere charge upon which there was never any arraignment or trial; and the rule as to parol testimony not controverting a record, or that as to estoppel from failing for many years to deny the charge, should not be so applied as to deny the party a day in court upon the merits of the question of desertion when the law has given him a right involving such merits;

and the record of a mere unproven charge can not have the same effect as the record of a conviction by court-martial.

If this is at all violative of the rule that parol testimony is not admissible to controvert a record, it is so by necessary implication of the law as expressed in said joint resolution; for otherwise, as above shown, the right expressly granted by said joint resolution to prove the faithfulness of a soldier's entire service would be denied a claimant. Said joint resolution must be given an effect consistent with its remedial character and obvious purpose.

One clear and manifest purpose in said joint resolution in providing that a last service during the war of the rebellion shall operate, for pensionable purposes, to cure the defect in the soldier's prior service arising from the lack of a discharge therefrom, is that such last service was in all respects faithful and honorable. If he, in fact, deserted, although a charge of desertion may have been removed from the record and an honorable discharge granted, under the act of July 5, 1884, as of the date of such desertion, such soldier does not come within the intent, scope, and benefit of said joint resolution, so as to be held and considered thereunder as honorably discharged from such prior service. It would be unconscionable for any person to found a right to the gratuity of the Government upon his own infamy, to secure, or attempt to secure, by one desertion immunity from the effects of another.

It is, therefore, held that, in a case like the present, the former record of a charge of desertion is only *prima facie* adverse in an adjudication under said joint resolution as to the faithfulness of the entire service in which such charge appeared; and that, in order to establish in such adjudication the faithfulness of such service, a claimant must produce evidence satisfactorily establishing that such soldier did not, in fact, desert as so charged. The adverse action in this case is reversed, in order that a thorough adjudication as to such question herein may be had, the question appearing to have been decided alone on the former record.

LINE OF DUTY—ACCIDENTAL INJURY WHILE SCUFFLING.

ADDIE F. WILDE (WIDOW).

The soldier was shot accidentally, by a comrade whom he had pulled out of bed "in a playful manner."

Held, That the wound was not received in the line of duty.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 21, 1904.

The Department has considered the appeal filed April 20, 1904, from the action of the Pension Bureau adverse to the claim of Addie F. Turner, formerly Wilde, for pension under the general law as the

widow of Benjamin F. Wilde, alias Charles H. Stanley, who was killed while serving as a private in Company I, Thirteenth Regiment New York Cavalry.

The said soldier first enlisted on November 4, 1862, in Company H, Forty-second Massachusetts Infantry, to serve nine months. He deserted from that organization November 25, 1862, and on September 4, 1863, enlisted in Company I, Thirteenth New York Cavalry, under the name of Charles H. Stanley. He again deserted December 5, 1863, but was arrested December 11, 1863, and returned to his regiment and served until November 27, 1864, when he died, as the records show, of an "accidental gunshot wound through right lung." His widow filed her application for pension May 30, 1865, and it was rejected in January, 1883, on the ground that the soldier was not in the line of duty at the time his fatal wound was received. Some additional evidence has since been filed, which has been held not to warrant any change of action. The grounds of the appeal are stated as follows:

We appeal the claim upon the grounds that the soldier was in camp and line of duty when the fatal wound was received, which we have established by evidence lately filed, which the Commissioner rules does not warrant a change of action. The soldier was in camp and line of duty and had just returned or was returning to his tent or quarters when the fatal wound was received.

The records of the War Department do not show the circumstances under which the soldier was shot, further than that the shooting was accidental. From the most reliable information it appears that while returning to his tent early in the morning, after feeding and grooming his horse, he went into the tent of one Corporal Porter and, in a playful manner, pulled him out of his bed. Porter caught up a carbine, made the remark that he had "got" the soldier and instantly fired, and the latter fell to the ground mortally wounded. Porter declared that he did not know the carbine was loaded, and upon investigation it was concluded that the shooting was not intentional.

The evidence recently filed does not show any materially different state of facts. The only question to be considered is whether the soldier was "in the line of duty" at the time he was shot.

It has been uniformly held by the Department for many years that injuries received by soldiers while voluntarily engaged in what is commonly known as "horse-play," wrestling, or scuffling, can not be regarded as received in the line of duty, and that they, or their widows or children, or dependent relations, are not pensionable for the results of such injuries. (William J. McPherson, 5 P. D., o. s., 47; Thomas W. McKee, 6 P. D., o. s., 83; John Brown, 8 P. D., o. s., 60; William Welsh, 4 P. D., 279; Mary A. Wilson, 6 P. D., 222. See, also, Henry A. Helmer, 7 P. D., 377, in which a contrary decision in the case of Mary E. McNeil, 3 P. D., 26, was overruled.) Likewise where the injury was inflicted in retaliation for some personal offense,

or in consequence of a quarrel or altercation. (Adolphus Limoges, 9 P. D., 274.)

Following the rulings in similar cases, the Department holds that the wound which caused the death of claimant's husband was not received in the line of duty. The action of the Bureau is affirmed. The claimant remarried in 1873 and is seeking pension under the act of June 27, 1890, on account of the service and death of her second husband.

RATES—SPECIFIC DISABILITY—ACT MARCH 2, 1903—TOTAL DISABILITY IN A FOOT.

CORNELIUS F. GRONER.

Claimant having been pensioned at the rate of \$24 per month from the passage of the act of March 3, 1883, for gunshot wound of right thigh and resulting paralysis of leg and foot, resulting in total disability such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot, he must have been totally disabled in the leg and foot and entitled to the rate of \$40 per month provided by the act of March 2, 1903.

The Bureau having conceded his right to the benefits of said act, the increased rate of pension must commence from the approval of the act.

Assistant Secretary M. W. Miller, to the Commissioner of Pensions, May 21, 1904.

Cornelius F. Groner, who served as a private in Company D, Seventy-second Ohio Volunteer Infantry, from December 10, 1861, to October 9, 1865, was pensioned at \$6 per month from discharge, for "gunshot wound of right thigh." His pension was increased to \$8 per month from January 31, 1877, for "gunshot wound of right thigh." It was increased to \$18, third grade, from March 17, 1880, the medical approval being as follows:

Approved for gunshot wound of thigh (right) and results, viz, paralysis of foot and leg, complete. Total, third grade, \$18.

It was again increased under the act of March 3, 1883, to \$24 per month, the following appearing on the face brief:

Disabled by gunshot wound of right thigh and resulting paralysis of leg and foot, resulting in total disability, such as to render incapacity to perform manual labor, equivalent to the loss of a hand or a foot.

The words "resulting in total disability, such as to render incapacity to perform manual labor, equivalent to the loss of a hand or a foot." were stamped on the face brief with a rubber stamp.

March 25, 1895, he applied for an increase, when the following medical approval was spread upon the face brief:

Approved for gunshot wound of right thigh and resulting paralysis of foot and leg, complete. Third grade. No increase. Alleged rheumatism not accepted as result.

March 13, 1903, he applied for an increase, in which he said:

Under the maimed-soldiers' act I claim to be entitled to \$40 per month, as passed and became a law March, 1903.

This claim was rejected on medical grounds, as appears by the following spread on the face brief:

Approved for gunshot wound of right thigh and resulting paralysis of leg and foot. Third grade. No increase.

From this action claimant appealed February 1, 1904.

The following affidavit was filed with his application for the benefit of the act of March 2, 1903:

I have been practicing medicine 39 years. I first knew the soldier about August, 1901. I first treated him professionally about September, 1901. I have carefully examined Cornelius F. Groner and find the right foot and leg below the knee paralyzed and absolutely useless. He has an appliance or brace which enables him to walk indifferently by the additional use of a cane. The foot and leg hangs limp or dangles, having no control of muscular action or direction of muscular action. This condition is the result of gunshot wound entering lower third of right leg above knee-joint, passing downward and outward through popliteal region, severing bundles of arteries and nerves of same. The claimant would be better off if amputation had been performed and an artificial leg adjusted. His disability is equal to the loss of a leg.

P. H. ELLSWORTH, M. D.,

*Surgeon, One hundred and sixth Illinois Infantry Volunteers
during war of the rebellion.*

He was examined under the pending claim by a board of examining surgeons at Hot Springs, Ark., October 7, 1903, under special instructions from the medical referee of your Bureau, which reported as follows:

The missile entered lower third of thigh about the head of the gastrocnemius muscle at inner side and passed directly through behind the femur, severing the popliteal artery and nerve. Inner cicatrix about three-fourths inch, not adhesive; outer about 1 inch, and not adhesive.

There is atrophy; measurements are as follows: Left leg 2 inches below knee, 14 inches; right at corresponding point, 13 inches. Around left calf, 17 inches; right at corresponding point, 15 inches. Around left ankle, 9½ inches; around right, 9½ inches, right being puffed by reason of varicose veins in ankle and foot. Right knee is fairly movable; motion is perhaps limited one-third. Ankle joint is weak and is unable to sustain the weight of the body owing to paralysis of muscles of the leg below knee, and motion in ankle joint is impaired three-fourths.

There is no pathological condition in foot except varicose veins; lower branches of internal saphenous are enlarged to about twice or thrice natural size and some minute veins are ruptured.

The state of nutrition of leg and foot is fairly good; that is, collateral circulation appears to be fairly well established. Skin is for the most part clear and healthy. It is discolored at ankle and foot where veins are enlarged in consequence of the varicosity only. Sensation is impaired about half as compared with other leg. Power of knee impaired about half. Ankle impairment is nearly complete. He does not bear any weight on foot in standing. In walking it is necessary to hold the ankle up by means of a brace which he has made in the boot, and he supports himself with a cane. Without the above artificial aids he would be unable to walk.

The disability for the performance of manual labor is equal to the loss of the foot and warrants the rate of \$24.

There are no other disabilities and there is no evidence of vicious habits.

He was formerly examined under special instructions from the medical referee by a board of surgeons at Pueblo, Colo., October 28, 1896, which reported as follows:

Gunshot wound of right thigh: Ball entered about 1 inch above inner condyle of femur passing through upper portion popliteal space slightly backward and passing out on about same line opposite side. A scar about 1 by 1 inch at entrance, same on exit, with thickening of tissues at that point size of walnut. We find tendon reflex gone and all the extensor muscles from knee to foot completely paralyzed; flexor partially so; the leg and foot are cold; foot, and especially toes, are painful, especially upon pressure. Claimant walks with cane; the leg and foot are lifted and thrown forward by the effort of the thigh muscles. Claimant can walk without cane, but it becomes very tiresome if continued long. The knee and hip seem normal. Slight crepitation in ankle, probably due to inactivity of joint. The measurements are: Right leg through ball of foot, 8½ inches; heel and instep, 12½ inches; ankle, 10 inches; lower one-third leg, 10½; calf, 13; knee, 14½. Left leg through ball of foot, 9 inches; heel and instep, 13 inches; ankle, 10 inches; lower one-third leg, 10½; calf, 16; knee, 15½.

We rate as specified total disability of one hand or foot, \$30 per month.

We find no evidence that any of the above conditions have been aggravated by any vicious habits on part of claimant.

The act of March 2, 1903, under which pensioner claims, in so far as it relates to this claim, is as follows:

That from and after the passage of this act all persons on the pension roll, and all persons hereafter granted pension, who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand or one foot, or been totally disabled in the same, shall receive a pension at the rate of \$40 per month.

A single surgeon who examined claimant at North Platte, Nebr., January 31, 1887, states:

Complete paralysis below the knee—loss of all power to raise or elevate the foot. The foot drags, but is aided and supported by steel springs and other appliances in and about the boot.

The same is stated in a certificate of March 17, 1880, and it is further stated that "the toes rolled in under the foot."

It is described the same in a certificate dated October 31, 1877.

In the case of Joseph Becher (2 P. D., 109), Assistant Secretary Hawkins said:

Since appellant's disability is confined to the foot, it is a manifest absurdity to rate him at \$24 under the act of March 3, 1883, for a disability therein equivalent to its loss. If his disability of foot is such as to be equivalent to its loss it must necessarily be total and permanent; and for such a disability said statute specifically provides. * * * The act of August 4, 1886, merely substitutes the rate of \$30 per month for the loss of or total disability in hand and foot, but makes no provision for equivalent disabilities, leaving that portion of the act of March 3, 1883, to stand as it was.

In the case of Martin V. B. Richardson (1 P. D., 373), the same Assistant Secretary held (syllabus) that—

In applying the act of June 30, 1883 (?) (March 3, 1883), wherein occurs the language, viz, "or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or a foot," it is held that the word "otherwise" in said act refers to any or all disabilities other than the loss of a hand or a foot, or total and permanent disability in the same.

In the case of John R. Weddle (2 P. D., 97), Assistant Secretary Hawkins said:

In view of the explicit opinion of the medical referee, December 12, 1883, whereby claimant was rated at \$24 per month for gunshot wound of left hand, resulting in total disability such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot, the foregoing language of the act of August 4, 1886, seems to be mandatory. There can be no escape from the necessary operation of it, and, inasmuch as at the date of its passage and approval claimant was on the pension roll at \$24 per month for total disability of left hand, he became by virtue of said act entitled, for the same disability, to \$30 per month. * * *

In the case of Christian Miller (4 P. D., 351) it was held that—

The words "totally disabled in the same" used in the act of August 4, 1886, are construed to mean such a disability as renders the limb or member of no practical use or convenience—a disability as great as if the limb had been actually amputated.

In the case of William Clive (7 P. D., 119) the words "totally disabled in the same" in said act (August 4, 1886) was construed to mean a disability of the limb, not for ordinary manual labor merely, but a total disability for all practical use or convenience.

In the case of Harrison H. Mason (4 P. D., 244) the claimant was examined September 7, 1887, by a board of surgeons which reported the following:

Upon examination we find the following objective conditions: Gunshot wound of ankle; immediately behind the inner malleolus there is an indolent ulcer (point of entrance), oval shaped, one-half inch long, 1 inch in greatest width. In front of external malleolus is an irregular ulcer 2 inches long, three-fourths inch in width. The lines of the malleoli are obscured by the general tumefaction of the contiguous structures. The whole foot is swollen, and every joint of the foot, including the toes, is ankylosed. The ankle joint is also permanently ankylosed. The bones of the foot and the lower end of the tibia are in active carious process. His disability is more than equivalent to loss of the foot. This board rates him "total third grade" for the disability of left foot described.

He was again examined October 30, 1889, when the following condition was reported:

Upon examination we find the following objective conditions: We find the general appearance of claimant fairly good, being well nourished. Upon examination we find two chronic ulcers, cup shaped, with indurated edges, and same condition of tissues surrounding both, one upon inner side of left leg, posterior to internal malleolus, 3½ inches long by 2 inches wide at widest part, the other same general appearance, located in front of external malleolus, left. We find ankylosis of ankle joint, also of tarsal, metatarsal, and phalangeal joints. The ankle and foot measures 2½ larger in all measurements than the right foot. There is diminished

circulation, as well as nervous sensibility in foot on account of the general indurated condition of soft parts of foot due to inflammatory processes, the result of injury. Also an eczematous condition of lower third of leg. We find no evidence at all of railroad injury, and as far as we can see has nothing to do with disability. The foot is practically useless, and we think claimant's life would be prolonged and he would suffer less if it were amputated. This board further state that they consider his disability as above described by them to entitle the appellant to a rating for loss of leg at the lower third.

On these examinations Assistant Secretary Bussey said:

Now, it is manifest that the two foregoing certificates of medical examination describe practically the same disability of appellant's left foot and ankle existing at the dates when said examinations were made, respectively, and if they are to be considered as establishing anything at all, they undoubtedly prove that he was afflicted with a total disability of left foot at said dates. There is not one particle of evidence on file, nor is there even an opinion by the medical officers of your Bureau, controverting the findings of the examining surgeons as set forth in said certificates, and yet, upon the basis of the certificate of the medical examination of September 7, 1887, the appellant was given a rating of \$16 per month from that date, and on the basis of the certificate of the medical examination of October 30, 1889, a rating of \$24 per month from said latter date, notwithstanding the fact that said examinations both established the existence of a permanent specific disability to which the law attached a specific and certain rate.

In the case of Samuel D. Frank (13 P. D., 362), decided April 15, 1903, it appeared that there was "complete ankylosis of the left elbow joint at nearly a right angle, caused by gunshot wound received at the battle of Monocacy, Md., July 9, 1864." He could raise his arm 45 degrees and could move his elbow in one direction to a right angle, but the rotary motion of elbow was lost so that he could not turn the palm of his hand upward. The forearm could not be turned. The wrist motion was unimpaired, except by the atrophy which affected the whole arm. The functions of the hand were completely destroyed.

Under this state of facts it was held:

It would be unreasonable to assume that an arm is not totally disabled until every joint is stiff and immovable. The fact that claimant has some power to move his shoulder, while the balance of the arm is completely useless, does not indicate that the arm can be used for any practical purpose.

The action was reversed and claimant was given \$36 per month.

It is manifest from the foregoing that if appellant is totally disabled in the foot he is entitled to the \$40 rate provided by the act of March 2, 1903; and being pensioned at \$24 per month for—

Gunshot wound of right thigh and resulting paralysis of leg and foot, resulting in total disability such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot,

he is entitled under the decisions in the Becher, Weddle, Frank, and Miller cases to pension for total disability in leg and foot, and to \$40 per month under the act of March 2, 1903.

As said in the Weddle case (*supra*):

In view of the explicit opinion of the medical referee * * * whereby claimant was rated at \$24 per month for "gunshot wound * * * resulting in total disability, such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot, * * *"

there can be no escape from the necessary operation of the act of August 4, 1886, and the act of March 2, 1903.

As said in the case of Becher (*supra*):

Since appellant's disability is confined to the foot, it is manifest absurdity to rate him at \$24 under the act of March 3, 1883, for a disability therein equivalent to its loss. If his disability of foot is such as to be equivalent to its loss, it must necessarily be total and permanent.

That appellant is entitled to the rate of \$40 per month under said act is conceded by the medical referee, as appears from the following opinion, rendered May 11, 1904, since the appeal was filed, viz:

After a careful reconsideration of this case, the medical action of January 15, 1904, from which appeal is taken, is not adhered to.

If the claim for increase be resubmitted the rate of \$40 will be allowed from October 7, 1903, for gunshot wound of right thigh and resulting paralysis of leg and foot, resulting in total disability of right foot.

You state that if it meets the approval of the Department the action indicated by your medical officer will be taken, and recommend the dismissal of the appeal.

The Department can not approve the action proposed by you, as it would be contrary to the statute under which appellant claims, which provides—

That from and after the passage of this act all persons on the pension roll * * * who, while in the military or naval service of the United States and in line of duty, shall have lost one hand or one foot, or been totally disabled in the same, shall receive a pension at the rate of forty dollars per month.

So, if he is entitled to the \$40 rate, it is for a specific disability—total disability in the foot—and such rate must commence from the date of the passage of the act, just as under the act of March 3, 1883, under which claimant was pensioned.

You propose to increase his pension under section 4698½, Revised Statutes, which explicitly excepts permanent specific disabilities from its operation.

This is not a claim for increase on account of increased disability from causes on account of which pensioned, but a claim for the benefit of the act of March 2, 1903, which provides a rate of \$40 per month for a permanent specific disability, viz, the loss of a hand or a foot, or total disability in the same.

Appellant was pensioned at \$18 per month under the act of June 4, 1872 (now sec. 4698, Rev. Stat.), which provided such rate to persons

who "shall have lost one hand or one foot or been totally and permanently disabled in the same, or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or a foot," the approval being for—

Gunshot wound of thigh (right) and results, viz, paralysis of foot and leg, complete. Total third grade, \$18.

So the original approval for a grade rate was not for an equivalent disability but for a permanent specific disability—"paralysis of foot and leg, complete."

His condition has been the same from the time he was thus pensioned to the present time.

In the case of Richardson (1 P. D., 373), who was pensioned at \$24 per month under the act of March 3, 1883, Assistant Secretary Hawkins said:

It appears from an indorsement on your office face brief, dated June 30, 1883 (made by a rubber stamp), that said last increase was allowed because the soldier was found to be disabled by gunshot wound "resulting in total disability, such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot." This applicant's claim is analogous to the claim of Allen Cook, * * * recently decided by the Department on appeal. It was held, "Your action in increasing the appellant's pension under the act of 1883, under the clause reading 'or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or a foot,' appears to have been error. The increase should have been for a permanent and total disability in the hand, such being the fact disclosed by the record. The Department is of the opinion that the word 'otherwise,' in the act of 1883, refers to any and all disabilities other than the loss of a hand or a foot, or total or permanent disability in the same."

So, in this case, the disability being in the foot and leg (below the knee), it is a total disability in the same and not a disability "other than * * * total or permanent disability in the same."

As said before, he could not be pensioned at \$40 per month under the act of March 2, 1903, for a "disability equivalent to the loss of a hand or a foot," as said act, as well as the act of August 4, 1886, makes no provision for such a disability; thus his disability is permanent and specific, and the commencement of his pension is not governed by section 4693½ but by the act under which appellant claims, which provides that from and after the passage of the act he should receive \$40 per month.

Your action is therefore reversed, and you will issue certificate for a pension at the rate of \$40 per month from the date of the approval of the act, March 2, 1903.

As this claim is made special, you are requested to carry out this decision without delay.

SERVICE—CONTRACT SURGEONS—ACT JUNE 27, 1890.

SOLOMON F. WEHR.

Acting assistant or contract surgeons were not, during the war of the rebellion, officers or enlisted men in or any part of the Army, and are not pensionable under the act of June 27, 1890.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 25, 1904.

This appellant, Solomon F. Wehr, was a contract surgeon in the United States Army from June 22 to October 5, 1864, and in January, 1893, was allowed pension, certificate No. 844813, under the act of June 27, 1890, but was dropped from the rolls in October, 1894, under the decision of the Department in the case of Andrew J. Shannon (7 P. D., 64), on the ground that he was never legally mustered into the military service of the United States, and a claim for restoration, filed September 13, 1897, was rejected February 8, 1898, on the ground of "no title under act of June 27, 1890."

This action was affirmed by the Department August 9, 1899, under decision in the case of Harvey E. Bowles (10 P. D., 133).

The present appeal, filed January 13, 1903, is in reality a motion for reconsideration of said decision of August 9, 1899, and is accompanied by an 80-page printed brief and argument, attempting to show that acting assistant or contract surgeons are officers of the Army and are pensionable accordingly under said act.

This question was so fully discussed in said decision in the case of Harvey E. Bowles, *supra*, that it would appear to be settled. Most of the arguments used in the present brief and authorities cited therein were considered in that decision, and further comment thereon is unnecessary. It is unnecessary also to consider in detail all that is now advanced in support of the contention, which may be disposed of, with entire justice to the question and to the appellant, by a general statement as to the status of acting assistant or contract surgeons.

Such surgeons are not, to any extent whatever or in any sense whatever, an official constituent of the United States Army. There was, during the war of the rebellion, no law of Congress providing for them as part of the Army, either as to their entrance into or discharge from it, or as to their pay as being in and of the Army. They are not, in law or in fact, either enlisted or discharged. Their contract was essentially different from the soldier's contract of enlistment, which is *sui generis*, and from the officer's acceptance of an appointment, in that it was not provided for by any law of Congress relative to the Government's military establishment, while the latter were so provided for. They served and were paid, not as any part of such

establishment, but as mere civilian contractors with it for certain services.

The Judge-Advocate-General of the Army has held that such surgeon had no military rank or status, and was no part of such establishment, but merely a civilian employee; although amenable to military jurisdiction when employed in the field with an army in time of war, he was not subject to military orders in general, like an officer or a soldier, but only to such orders or directions as pertained properly to the performance of his particular duties, and was not eligible for detail as a member of a military court, though subject to trial by one: that he was neither a private, a noncommissioned officer, nor an officer, although assimilated as to duties, pay, and status to assistant surgeons, and they were "creatures solely of army regulations and orders, which are executive mandates wholly powerless to constitute them officers of the Army." (Digest of Opinions, pp. 112-114.)

It was held that such surgeon was not entitled to the benefits of the act of March 3, 1885, providing "for the settlement of claims of officers and enlisted men of the Army for the loss of private property." (Ibid.)

The Court of Claims has also held that an acting assistant or contract surgeon was not an officer of the Army within the act of March 3, 1883, providing longevity pay for officers of the Navy who had served as "officers or enlisted men in the Regular or Volunteer Army or Navy, or both." (*Byrnes v. The United States*, 26 Ct. Cl., 302.)

It was contended in that case, as it is in this, that the principles announced by the Supreme Court of the United States in the case of *Hendee v. The United States* (124 U. S., 309) are applicable; and the Court of Claims also considered in that case the decisions of the United States Supreme Court in the cases of *Mouat v. The United States* (124 U. S., 303) and *Ex parte Reed* (100 U. S., 13), also cited by appellant in this case. The Court of Claims also referred in that case, as does appellant in this, to the fact that acting assistant or contract surgeons are pensionable under the Revised Statutes. The decision of that court, therefore, may well be respected herein as of considerable weight as to the effect of the decisions upon which this appellant relies.

The Court of Claims in that case distinguished acting assistant or contract surgeons from paymasters' clerks, the decisions of the United States Supreme Court cited being with reference only to the latter. and after quoting from the decision in *Ex parte Reed*, *supra*, which was approved in that in *Mouat v. The United States*, *supra*, as to the duties required of and performed by paymasters' clerks, stated:

It does not appear that the claimant in this case was subject to the rules, regulations, and requirements imposed upon a paymaster's clerk, which seems to have been important in the consideration of the case of *Reed*. * * * The relations of the claimant to the Army were dependent upon a contract in the ordinary sense of the

term. He had no rank, but as part of his compensation he was to receive the fuel and quarters of an assistant surgeon of the rank of first lieutenant, and mileage when traveling under orders and not with troops; but these incidents were a part of his contract compensation, and he received them because they were provided in the contract as a measure of compensation.

The paymaster's clerk stood on a different footing also, because he was a statutory officer, provided for expressly by the laws of Congress, as part of the naval establishment, while acting assistant or contract surgeons were, as stated by the Judge-Advocate-General, "creatures solely of army regulations and orders." The former were held accordingly, in the case of *Hendee v. The United States*, supra, to have been officers of the Navy within the meaning of said statute as to longevity pay, and the latter, in the case of *Byrnes v. the United States*, supra, not to have been such officers.

The status of an acting assistant or contract surgeon appears to have been much like that of a paymaster's clerk in the Army, although the latter was expressly provided for by act of Congress, but not as part of the military establishment, being merely an employee as a citizen; and such clerks were held accordingly by this Department not to be pensionable under the act of January 29, 1887, as "officers or enlisted men of the military service." See *John H. Cassin* (2 P. D., 376).

Further discussion of this question need not be indulged in, as it is apparent acting assistant or contract surgeons were not any part of the legal military establishment of the United States. Much of the appellant's brief is taken up with quotations from the official records showing such surgeons were referred to in orders as "officers," but such denomination could not constitute them such. They must acquire their status as official constituents of the Army from the laws of Congress, and such laws nowhere, as above stated, make any provision for their inclusion in the Army.

They must also acquire their pensionable status from such laws alone, and the fact that Congress established their pensionable status under the Revised Statutes by separate express provisions distinct from those establishing the general pensionable status of the Army shows conclusively that Congress considered them not to be of or part of the Army and not, therefore, included within such general provisions as to the Army.

The act of June 27, 1890, provides pension for those who were in the Army, "all persons who served 90 days or more in the military * * * service * * * and who have been honorably discharged therefrom," as expressed in section 2 of said act, and for the widow of "any officer or enlisted man who served ninety days or more in the Army * * *, and who was honorably discharged," as expressed in section 3 thereof.

That the same identical class of members of the military establishment was intended in both these sections of the law can not be doubted. The collocation of the sections shows this conclusively. It was the class comprised in the official legal membership of the Army, the same class primarily provided for in the Revised Statutes, section 4693, and of which acting assistant or contract surgeons were not a part, as above shown by the laws of Congress themselves, by adjudications of the highest legal authority of the Army itself, and by the decision of the Court of Claims. Such surgeons not belonging to such class are not pensionable under the act of June 27, 1890, and the former decision herein is adhered to and the action appealed from reaffirmed.

LINE OF DUTY—EVIDENCE—ORIGIN.

EDWARD T. COURTNEY.

The evidence showing that the claimant incurred a hernia of the right side while in the service, with a strong probability that it was incurred in the line of duty, it is held that whatever of doubt there may be as to origin in line of duty should be resolved in his favor.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 25, 1904.*

The claimant in this case, Edward T. Courtney, was in the volunteer service as a private in Company F, One hundred and fifty-ninth Ohio Infantry, from May 2, 1864, to August 22, 1864, and is now a pensioner under the act of June 27, 1890. He also served in the regular army, as a member of Company I, Fifteenth U. S. Infantry, from May 23, 1879, to May 22, 1884; and of Company B, Sixth U. S. Infantry, by successive enlistments, continuously from June 21, 1884, to April 6, 1899, when he was discharged by reason of disability. On April 14, 1899, he applied for pension, alleging, among other things, that while in the line of duty at Fort Porter, N. Y., in February, 1891, he incurred a hernia on the right side by slipping on the sidewalk. The claim on account of hernia was rejected in April, 1902, on the ground of his "inability to furnish satisfactory evidence to show incurrence in line of duty." From that action he appealed, through his attorney, February 2, 1903.

In an affidavit filed August 2, 1901, the claimant related the circumstances of his injury as follows:

I was walking on Rhode Island street, Buffalo, N. Y., my station being Fort Porter. I slipped and fell, the walk being slippery. I thought nothing of it at the time, but the next day I had sharp pains in my right groin when taking a bath. A day or two after the injury I noticed an enlargement in my groin. The following day I went to see the post surgeon, Dr. E. F. Gardner, who pronounced it hernia. I was

alone when I fell. I was not treated by an army surgeon for this injury after this, for I had all my trusses made by Worcher & Son, manufacturers, Sixth street, Cincinnati, Ohio.

In another affidavit he says:

There are no commissioned officers that know of the facts of my injury only what I told them. * * * The treatment I received was such that I was relieved of being compelled to go to the post hospital, and my age, the doctor said, forbade an operation. Dr. Edwin T. Gardner, at this time captain and assistant surgeon, medical department, United States Army, examined and attended me after my injury occurred. After the examination he said that the Government did not supply the truss I required, but I could wear one furnished by him until he could receive authority from the War Department to purchase one for me, which he did. * * * He is still in the service of the United States in the Regular Army.

There is no record of treatment for hernia at the time it is alleged to have been incurred nor until about eight years after. The records show treatment from February 5 to 6, 1899, for "right inguinal hernia, incomplete, in the line of duty." He was discharged from the service upon a surgeon's certificate of disability, in which appears the following statements:

* * * Became unfit for duty from present disease or injury, October 3, 1898.

Disease contracted or injury received, February 24, 1891, at Fort Porter, N. Y.

When disability arose soldier was on duty going to his quarters in Buffalo from Fort Porter, N. Y.

Cause of disease or injury, or circumstances under which it appeared, was as follows:

"Sergeant Courtney has been complaining and has been under treatment for hernia since and during the encampment at Tampa, but it did not seem to prevent him from marching during the campaign in Cuba.

"Disability was incurred in line of duty."

Station: Fort Sam Houston, Tex.

Date: February 10, 1899.

H. J. HUNT,

First Lieutenant, Sixth Infantry, Commanding Company B.

I certify that I have carefully examined the above-named soldier, and find him incapable of performing the duties of a soldier because of right inguinal hernia, incomplete. The hernia was complete and the man had been wearing a truss for some years. Unsuitable for operation. Incapacitates by interfering with locomotion during drill and on the march, by requiring a special truss, and by reason of danger from strangulation when such a truss has broken and another not easily obtainable. * * * Incurred in line of duty. From his statement it appears the disease was contracted February 24, 1891, by slipping on ice while going to his quarters for dinner. No other evidence except that hernia is plainly of long standing. Length of time case has been under observation: since October 3, 1898.

C. L. WEIGMANN,

Surgeon U. S. Army, Post Surgeon.

The claimant's statement as to the origin of his hernia having been referred to Surg. E. F. Gardner for any information he might be able to give in regard to the case, was returned by him on January 23, 1902, with the following indorsement:

I remember furnishing this man with a special truss at the time within mentioned. To the best of my recollection the hernia was at that time believed to be of recent

occurrence. But the length of time that has elapsed makes it impossible for me to give any reliable data, further than the fact of making application for and furnishing the special truss.

Lewis R. Taft testifies, by affidavit filed February 24, 1900, that in the spring of 1891, he thinks, but will not be certain, the claimant complained and said that he had been ruptured by slipping on the sidewalk and that he was, through the post surgeon, getting a good truss. Affiant was then a member of Company B, Sixth U. S. Infantry, and often heard him speak of it, but knows nothing more.

The foregoing is all the evidence there is in regard to the origin of the hernia, and from the nature of the case it is not probable that any better evidence can be obtained. If the claimant was alone at the time he fell on the sidewalk (as he swears he was) it is, of course, impossible for him to furnish the testimony of an eye witness of the accident. The absence of such testimony, however, is not necessarily fatal to the claim. Is it a reasonable inference, from all the known facts, that the hernia was incurred in the service and line of duty as alleged? If so the claim may be allowed.

It must be presumed that the claimant was free from hernia when he enlisted in the Regular Army in June, 1884. He was continuously in the service until 1899, when he was discharged on account of hernia. Therefore the disability must have originated in the service.

The evidence indicates that it was incurred at the time and place alleged. Doctor Gardner, who was the post surgeon, remembers furnishing him with a special truss at or about the time, and that the hernia was then apparently of recent origin. Comrade Taft thinks it was the spring of 1891 when he heard claimant state that he had been ruptured by falling on the sidewalk and was getting a truss through the post surgeon. The surgeon who examined him at the time of his discharge says that the hernia was "plainly of long standing."

The only point as to which there may be reasonable doubt is whether the injury was incurred while claimant was in the line of duty. On this point there is no direct evidence except his own statements. It is to be remarked, however, that his statements appear to have been consistent throughout, and that there is nothing in them that is improbable. The officers who recommended his discharge evidently believed them to be true, and they knew the man. He appears to have been a good soldier. He enlisted as a private in May, 1879, was promoted to corporal in August, 1881, and to sergeant in January, 1883. He entered the service again as a private in 1884, was appointed corporal in September, 1887, and promoted to sergeant in March, 1889, and held that rank until his final discharge. It is true that the records show treatment in July, 1895, for subacute catarrhal gastritis, due to "excessive use of stimulants, not in line of duty." This might give rise to a suspicion that he was intoxicated when he fell on the sidewalk

and incurred his rupture, but it would be unjust to reject his claim upon a mere suspicion. He has furnished the best obtainable evidence, and has certainly established a strong probability that he incurred his hernia at the time and place and in the manner alleged. The claim must either be allowed on this probability or rejected because of a possibility that the injury was due to his own fault. In view of his long service and generally good record, and the other favorable features of the case heretofore referred to, the Department is of the opinion that whatever of doubt there may be as to incurrence in line of duty should be resolved in the claimant's favor.

The action of the Bureau is reversed, and the case remanded for readjudication in accordance with this opinion.

DIVISION OF PENSION—DESERTION—DIVORCE—SEPARATION—ACT OF
MARCH 3, 1899.

JONES V. JONES.

Pensioner's bill for divorce was based upon the fact that he had been living apart from claimant without any cohabitation for five consecutive years next before his application. The question of marital desertion was, therefore, not involved in the judicial proceedings or passed upon by the court granting him a decree of divorce.

Where a husband leaves his wife and fails to contribute to her support and without procuring a divorce from her, or, believing her to be dead, marries another woman, the law will presume, in the absence of proof to the contrary, that he intended to desert his wife.

Pensioner having left claimant and the matrimonial domicile, it is incumbent upon him to show that he was legally justified in so doing, in order to relieve himself of the charge of desertion.

So much of the Bureau action of April 1, 1904, as held that "pensioner is not legally chargeable with marital desertion for any period prior to February 17, 1904," the date on which he procured a divorce from claimant in Kentucky, is not sustained by the evidence.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 25, 1904.

Mrs. Susan J. Jones appealed September 30, 1903, from the Bureau action of August 28, 1903, rejecting her claim, filed August 15, 1903, for one-half the pension of her husband, William Jones, a pensioner under certificate No. 1043928, wherein it was held that she had failed to furnish the evidence necessary to establish her title within the meaning of the act of March 3, 1899.

On October 12, 1903, the Bureau requested a return of the papers, with a view to reopening and readjudication of said claim under rule 14 of practice as amended. The papers were accordingly returned, when, on April 1, 1904, the Bureau again rejected said claim on the ground that claimant was no longer the lawful wife of pensioner, he

having obtained a divorce from her in the Henderson circuit court, Henderson County, Ky., February 17, 1904, and that pensioner is not legally chargeable with marital desertion for any period prior to that date.

The papers are now returned to this Department for consideration of said appeal.

Claimant contended in her said appeal that she had furnished all the evidence called for by the Bureau except as to the nonmarriage of soldier; that she had made diligent effort to obtain the evidence, but for lack of funds to enable her to see the witnesses who knew that her husband was never married until he married her, she had been unable to comply with said Bureau request.

There appears to have been no necessity on the part of the Bureau to have called for evidence as to pensioner's not having been previously married, as the question of the legality of his marriage with claimant was not denied by him, but on the contrary, was admitted. As held in the case of *Wardwell v. Wardwell* (14 P. D., 234):

When, therefore, a claimant has alleged and proved a marriage by producing a certified transcript of record of her marriage to pensioner, or has established by other satisfactory evidence the celebration of a marriage ceremony between them, * * * and the alleged pensioner husband is duly notified thereof * * * she should not be called upon, in the absence of any evidence questioning the validity or legality of such marriage, to furnish proof of the legal qualification of either herself or her alleged husband to contract said marriage, as the burden of proof to disprove the subsisting validity of the established marriage is upon the husband or the party questioning its validity.

Claimant's contention in her said appeal, so far as it relates to the first rejection of her claim by the Bureau, appears to have been well taken.

She had alleged and proved her marriage to pensioner on July 1, 1869, in the State of Kentucky, and her cohabitation with him up to about 1893, during which time six children had been born as the issue of said marriage; that pensioner had deserted her many years prior to filing her said declaration, since which time he had not contributed to her support, and that she was a woman of good moral character and in necessitous circumstances.

It appears that on March 26, 1904, pensioner filed a copy of the decree of the circuit court of the county of Henderson, Ky., wherein said court, on February 17, 1904, had granted him a decree of divorce from claimant.

Pensioner testified in an affidavit Nov. 16, 1902, that in January of that year he had filed his petition for divorce in said court, and that the grounds alleged for divorce were :

Separation for a period of five years, which, in Kentucky, is legal ground for divorce. This being the law and these being the facts, I allege no other grounds.

The suit has been pending since that time and she has not made any defense whatever.

Under the laws of Kentucky "living apart without any cohabitation for five consecutive years next before the application" is sufficient cause to authorize a court having general equity jurisdiction to grant a divorce to both husband and wife. See General Statutes of Kentucky, 1883, page 523.

As pensioner's bill for divorce was based solely upon the fact that he had been living apart from claimant without any cohabitation, for five consecutive years next before his application, it is evident that the question of marital desertion was not involved in the judicial proceeding or passed upon by the court granting him a decree.

It is only to the extent of the questions passed upon by a competent court having jurisdiction that this Department is bound. In the recent case of *Hendershott v. Hendershott* (14 P. D., 130), the question before the court was whether pensioner's wife had been guilty of extreme cruelty. The fact that the pensioner's bill in that case was dismissed at the hearing did not conclude the Department from inquiring into the cause of the separation or the alleged cruelty on the part of the wife. The statutory ground of desertion in that case, under the Michigan statute, was "extreme cruelty." But, as stated by the Department in that decision, quoting from *Stewart on Marriage and Divorce*, paragraph 257:

One party to a marriage is justified in leaving the other by the other's consent; conduct implying consent by the other; by such conduct on the part of the other as is cruel, outrageous, though not amounting to cause for divorce.

Courts often grant a decree of separation, while refusing a decree for absolute divorce.

So in the case under consideration, the court, under the Kentucky statute, was authorized to grant a decree of divorce on the ground of five years' separation, regardless of which party was in fault for the separation.

Pensioner testified in an affidavit October 28, 1903, as follows:

In April, 1903, I and the claimant, Susan J. Jones, separated, and we have not lived or cohabited together as husband and wife since that date. I have never seen her but once during that time. We had at that time four children living. At the time we separated we were living on a farm. I went away from home, took one horse, left all the remainder of stock, farm implements, etc.

The only reason assigned by pensioner for leaving his wife is contained in his affidavit, November 16, 1903, wherein he testified as follows:

The reason for the separation being such temper and quarrelsome disposition on her part that it showed a settled aversion.

He has failed to support his testimony with that of other witnesses, whereas claimant has proved by reputable witnesses that he deserted

her without cause on her part. She testified November 25, 1903, as follows:

I know of no cause why my husband left me unless it was his infatuation for a woman with whom he was living in Daviess County, Ky. My sons, who have visited their father, William Jones, state to me that he is so living with one of his own cousins, Belle Jones.

In answer to Bureau circular of April 20, 1898, pensioner stated that he was married to Belle Jones November 26, 1896, at Lebanon, Marion County, Ky.; that he was not previously married.

In answer to similar inquiries of October 19, 1903, pensioner stated that he was married to Susan Jane Jones in Henderson County, Ky., July 1, 1869.

On January 13, 1904, his attention was invited to this discrepancy in his statement and an explanation was called for. No explanation appears to have been made by pensioner. It is further to be noted that he does not specifically deny having deserted claimant.

When a husband leaves his wife and fails to contribute to her support, and, without procuring a divorce from her or believing her to be dead, marries another woman the law will presume, in the absence of proof to the contrary, that he intended to desert his wife. (Stewart on Mar. and Div., par. 259, note 13, p. 7.)

Pensioner having left claimant and the matrimonial domicile, it is incumbent upon him to show that he was legally justified in so doing in order to relieve himself of the charge of desertion.

The Department is of the opinion that so much of the Bureau action of April 1, 1904, as held that "pensioner is not legally chargeable with marital desertion for any period prior to February 17, 1904," the date on which he procured a divorce from claimant in Kentucky, is not sustained by the evidence.

Said action is accordingly reversed and the papers in the case are herewith returned for a readjudication of this claim in accordance with this decision.

**RATES—SPECIFIC DISABILITY—ACT MARCH 2, 1903—TOTAL DISABILITY
IN BOTH FEET.**

WILSON S. BARNEY.

Those persons who are totally disabled in both feet are not included in any class of beneficiaries mentioned in the act of March 2, 1903, and are not entitled thereunder to a pension of \$100 per month.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 28, 1904.*

Wilson S. Barney, who served as a private in Company A, First Wisconsin Volunteer Cavalry, from September 10, 1862, to November 16, 1863, was pensioned under the general law at the rate of \$72 per

month (first grade) on account of disability on account of rheumatism, when, June 15, 1903, he filed a claim for increase, alleging that he was "totally disabled in both feet" and nearly totally disabled in both hands; "that his disabilities in both feet is equivalent to the loss of both feet."

The claim was rejected by letter of November 7, 1903, and formally disposed of by brief face action, May 14, 1904, on the ground of no title under the act of March 2, 1903, as claimant had not lost both feet, and that no provision was made for a rate for total disability in the same.

An appeal was filed November 21, 1903, contending in effect that the words in the act "in like manner, shall have lost both feet," refers to the preceding sentence and means "or been totally disabled in the same."

The act referred to is as follows:

That from and after the passage of this act all persons on the pension roll, and all persons hereafter granted a pension, who, while in the military or naval service of the United States and in the line of duty, shall have lost one hand or one foot, or been totally disabled in the same, shall receive a pension at the rate of forty dollars per month; that all persons who, in like manner, shall have lost an arm at or above the elbow or a leg at or above the knee, or been totally disabled in the same, shall receive a pension at the rate of forty-six dollars per month, that all persons who, in like manner, shall have lost an arm at the shoulder joint or a leg at the hip joint, or so near the shoulder or hip joint or where the same is in such a condition as to prevent the use of an artificial limb, shall receive a pension at the rate of fifty-five dollars per month, and that all persons who, in like manner, shall have lost one hand and one foot, or been totally disabled in the same, shall receive a pension at the rate of sixty dollars per month; and that all persons who, in like manner, shall have lost both feet shall receive a pension at the rate of one hundred dollars per month: *Provided however*, That this act shall not be so construed as to reduce any pension under any act, public or private.

As stated on the face brief said act provides no rate for total disability in both feet, nor for a disability equivalent to the loss of the same, nor can the act be construed to cover such a disabling case.

The words "who, in like manner," refer to the preceding words "all persons" * * * "who, while in the military or naval service of the United States and in line of duty" and not to words "or been totally disabled in the same."

In other words it refers to the "manner" in which the disability was incurred, and not to the character of the disability.

The classes of persons whose pensions were increased by said act of March 2, 1903, are—

1. All persons "who, while in the military or naval service of the United States and in line of duty, shall have lost one hand or one foot, or been totally disabled in the same."
2. All persons "who in like manner", that is, all "who, while in the military or naval service of the United States and in line of duty,"

* * * "shall have lost an arm at or above the elbow or a leg at or above the knee, or been totally disabled in the same."

3. All persons "who, while in the military or naval service of the United States and in line of duty," * * * "shall have lost an arm at the shoulder joint or a leg at the hip joint, or so near the shoulder or hip joints or where the same is in such a condition as to prevent the use of an artificial limb."

4. All persons who, while in the military or naval service of the United States and in line of duty "shall have lost one hand and one foot, or been totally disabled in the same;" and

5. All persons who while in the military or naval service of the United States and in line of duty "shall have lost both feet."

The act plainly and clearly indicates the particular condition which entitles to an increase in the rate of pension, and total disability in both feet or an equivalent disability is not provided for.

In the case of *Alexander P. McElroy* (9 P. D., 401) it was held that said act did not "increase the pensions of those who have a disability equivalent to the loss of a hand or a foot," though the act that it amended (March 3, 1883) provided the same rate for such a condition as it did for the loss of a hand or foot or a total disability in the same.

"It is the duty of courts so to construe statutes as to meet the mischief and to advance the remedy." *Potter's Dwarries on Statutes and Constitutions*, 144.

What was the mischief sought to be remedied by this statute? The rate, \$72 per month, provided by the act of June 17, 1878, for the "loss of both feet."

What the remedy? The rate of \$100 per month for the "loss of both feet."

It was held that a "bull" was not included under the words "or other cattle," as used in a statute which made it indictable for any person to wantonly or cruelly beat, abuse, and illtreat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle. The court said:

"Horse, mare, gelding, are one class; ox, cow, heifer and steer are another, and in my opinion the bull is not included in this act." *Hill, ex parte* (3 C. & P., 225) cited in *Sutherland on Stat. Con. Sec.*, 268.

So in this case those totally disabled in a hand or a foot are included in one class of beneficiaries under the act of March 2, 1903; those totally disabled in a leg in another; those who have lost an arm or leg so near the shoulder or hip joints or where the same is in such a condition as to prevent the use of an artificial limb in another, and those totally disabled in one hand and one foot in another class; but those totally disabled in both feet are not included in any class mentioned in the act, notwithstanding their condition is probably more disabling than the loss of the feet.

The action of the Bureau appealed from was therefore proper and the same is accordingly affirmed.

MARRIAGE—LAWS OF DELAWARE—CEREMONY—ACT OF JUNE 27, 1890.

FRANCES HOPKINS (WIDOW).

Claimant and soldier lived together from a date subsequent to the civil war to about the years 1897 or 1898, when they were married by a ceremony.

Some positive act or ceremony is necessary to render valid a marriage contract in the State of Delaware. Revised Code State of Delaware, chapter 74, section 2. Jackson v. Benjamin Collins (2 Houston, 128); State v. Miller (3 Pennewill, 518).

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 28, 1904.

Frances Hopkins, as widow of James Hopkins, formerly a private in Company G, Forty-third U. S. Colored Volunteer Infantry, filed her declaration on November 15, 1901, under the act of June 27, 1890.

The claim was rejected November 18, 1902, on the ground that claimant's marriage to the soldier was subsequent to the passage of said act. An appeal was filed January 2, 1903,

The facts in the case are as follows: The soldier, James Hopkins, had lived for many years at Lewes, Del., with Harriet Wiltbanks, and had several children by her, and the said Harriet was known as his wife, though there probably never was a marriage ceremony.

At a subsequent date, which can not be definitely fixed, but prior to the passage of the act of June 27, 1890, Frances Brown, who had been living at Chincoteague Island, Va., at the home of the mother of James Logan, by whom she had one child called James Henry Brown, came to Lewes, bringing the child with her.

Soon after her arrival in Lewes, date uncertain, she went to live with the soldier, James Hopkins, who soon after parted from Harriet Wiltbanks, and they lived and cohabited together as man and wife, although for a time thereafter she was known as Frances Brown. About 1897 or 1898 James Hopkins and Frances Brown were married by Rev. Mathew Seamans, who represented himself to be an evangelist, and who soon after left for other fields.

From this statement of facts, it would hardly seem necessary to enter upon a discussion of the legality of claimant's marriage, but her attorney contends that the evidence shows that the said Frances was the soldier's common-law wife.

It may be that a "common-law marriage" is valid in Delaware. In common with other States enjoying the common law of England as an inheritance, she has provided by her constitution (Art. VII, 5 and 9) that all laws existing at the time of its adoption, not inconsistent with it, should remain in force unless altered by future laws, i. e. where

not abrogated the common law continues in force. Likewise, in common with other States, she has provided by statute for the solemnization of marriage (Rev. Code, Amended Chapter 74, sec. 2), designating those authorized to perform the ceremony.

The Laws of Delaware, Revised Code, as amended, chapter 74, section 2, provides that—

Every preacher of the gospel, ordained or appointed according to the rules of the church to which he belongs, shall have authority to solemnize marriages. Also marriages may be solemnized or contracted according to the forms and usages of any religious society, when either of the parties belong to such religious society. The mayor of Wilmington may also solemnize marriages.

In some States a similar provision has been treated essentially as mandatory; in others merely as directory. That the latter is probably true in Delaware the decision of the court in *Jackson v. Collins* (2 Houston, 128) indicates.

In the case above referred to the presiding justice charged the jury as follows:

Marriage, in contemplation of the common law, is a civil contract, but it can only be contracted by some positive act, or ceremony, or solemnization recognized by the law of the place where it is entered into. But notwithstanding it must be so contracted, it is not in all cases necessary that the fact of its having been contracted should be susceptible of direct and positive proof, as by a person who was present at the time and witnessed the ceremony; ordinarily it may be proved by secondary or circumstantial evidence, and in a case like the present a lawful marriage may be inferred, or presumed by the jury from the facts and circumstances proved—that they lived and cohabited together as man and wife lawfully married to each other, proclaimed and represented themselves uniformly to be so, and visited together, and were received, recognized, and entertained among their relatives, friends, and acquaintances as such, if in the judgment of the jury all the evidence in the case bearing upon the point should warrant such a conclusion. But they must be satisfied that there was a lawful marriage between them.

In that case no special time and place were alleged as to the solemnization of the marriage in question.

Indeed, in its beginning the relation was probably illicit, but there was reliable circumstantial evidence pointing to some subsequent “positive act”—a contract of marriage.

In a more recent case decided since the beginning of the present century, that of *State v. Miller* (3 Pennewill, 518), the court cited that excerpt from *Jackson v. Collins*, above quoted, holding that marriage may properly be proved by competent and satisfactory circumstantial evidence, such as cohabitation, holding themselves out to the public as husband and wife, the admissions of the parties, etc.

In that case a marriage at a particular time and place, by ceremony, was alleged.

Yet marriage being “in contemplation of the common law” a civil contract, it would seem that it might be contracted by “some positive act” in Delaware, as well as by ceremony. The evidence, however, must unmistakably point to some “positive act.”

Assuming that an actual marriage without ceremony might be lawful in Delaware, it becomes a question of fact in the case at bar whether such a marriage was contracted by soldier and claimant at some time prior to the passage of the act of June 27, 1890. And in that connection it is pertinent to remark that if a common-law marriage between them can be deduced from the evidence, how much stronger would be the claim of Harriet Wiltbanks, who cohabited with soldier, bore him several children, and who is still living at Lewes.

The affidavit of Ellen Seaman, dated October 23, 1902, taken before the special examiner, is as follows:

I do not know my age (appears to be about 55). Post-office and residence, Lewes, Del. I am the wife of Rev. Mathew Seaman. He was an evangelist who came here several years ago, but has deserted me, and I do not know where he is. While here I remember he married the soldier, James Hopkins, to the claimant, Frances. I was not present at the wedding ceremony, but I remember very clearly the night the ceremony occurred.

At that time Hopkins and Frances lived together in a little shanty down by the beach.

I remember it was in the fall of the year, and it was about four years ago, but I can not remember the month.

I had known soldier and Frances for years before this. When I first knew soldier he was living with a woman named Harriet Wiltbanks as his mistress. He lived with her several years and they had children.

They parted, and after they parted he and Frances took up with each other and he had her for a mistress for a number of years before he married her.

Hopkins was a hard character, but Frances, when she came here, was a pretty decent woman, but after she went to live with Hopkins as his mistress she became rather disreputable herself.

Oh, yes; it was well known that Hopkins, the soldier, and Frances were not man and wife—were just living together as man and mistress—for years after they began living together, and up until their marriage by a ceremony, yet she was called Frances Hopkins.

The special examiner's statements contain, among others, the following:

The alleged marriage ceremony was about 1897 or 1898. * * * I could not learn where Reverend Seaman is. He disappeared suddenly from Lewes, leaving his wife. He was a stranger in Lewes. No one knew where he came from or went to, or whether in fact he was an ordained minister. He represented himself as an evangelist.

The affidavit of Sarah Mosely, dated October 22, 1902, taken before the special examiner, is as follows:

I am 31 years of age; post-office and residence, Lewes, Del.

I knew James Hopkins—he was my father, and I had known him all my life. He came here, so he said, about the close of the war, from the vicinity of Dagsboro and Millsboro. When he came here he took up with my mother, and they lived together as man and wife for several years, and she had eight children by him. I am the oldest living.

My mother and he were not married by a ceremony, but lived together as man and wife, as was often the habit at that period among the colored people of this locality.

He left my mother, and after a while he took up with Frances Brown, and he lived with her for about twenty years before his death.

She came here from Chincoteague Island, Virginia, and when she came here, stopped at our house. At that time my father and mother were keeping house together, and I expect it was while she was at our house that my father got in with her. I was then too young to remember about that.

When Frances came here she had one child, James Brown. He is dead.

I never knew who James Brown's father was. I understood he was born on Chincoteague Island, and was an illegitimate child.

The claimant went by the name of Frances Brown when she began to live with James Hopkins, and for years after that was known as Frances Brown, and until she married my father. * * * I understand they were married by ceremony here about four years ago, Reverend Seaman performing the ceremony, and after that she was called Frances Hopkins, and lived with him to his death, and has not remarried.

It is perfectly evident from the testimony that claimant's relations with the soldier were illicit in their inception. For years she was called Frances Brown, although cohabiting with James Hopkins, according to one witness. Even while known or called by others by the name of Hopkins, it was well understood in the neighborhood that the parties were not married—that they were man and mistress, not husband and wife.

When, then, did a change in their relations take place? What "positive act" on their part transformed a meretricious concubinage into a lawful marital union? The secondary evidence admissible under the decision in *Jackson v. Collins* proves merely a relation which must be understood in the light of its inception until there is evidence of some "positive act" indicating a change in the character of their cohabitation.

What "positive act" prior to the ceremony of 1897 or 1898 is shown? There is none. The very fact that a ceremony was performed in those years tends to negative the idea that there was a lawful marriage between them prior to that time.

The evidence fails to show that there was a marriage prior to the act of June 27, 1890, and as to any legal marriage having been consummated after the passage of that act, the Department expresses no opinion.

The rejection of this claim is affirmed.

MARRIAGE—MARYLAND LAWS—EVIDENCE—PRESUMPTIONS.

AMELIA K. SHANAMAN (WIDOW).

No record of the marriage of claimant and soldier, nor of a license to marry can be found, but claimant swears that they were secretly married in Baltimore, Md., by a Methodist minister, according to the Methodist ceremonial rites, and the

soldier in his lifetime deposed before a special examiner that he and claimant were married by a minister named Smith, in Baltimore, Md. The evidence shows that immediately thereafter they announced to their family and friends that they were married, and within a week of the date of the alleged marriage soldier and claimant commenced housekeeping and lived and cohabited together as husband and wife, and were so recognized by their relatives and acquaintances from that time until soldier's death.

Held, that under the decisions of the Maryland court of appeals which hold that "where parties live together ostensibly" as husband and wife "and are received into society and treated by their friends and relations as having and being entitled to that status, the law will presume * * * that they have been legally married," claimant is the widow of the deceased soldier.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 28, 1904.

Zadok M. Shanaman served in Company F, Fifth Maryland Volunteer Infantry from April 25, 1898, until discharged October 22, 1898. He died July 25, 1901.

On July 30, 1901, Amelia K. Shanaman filed a claim for a pension as the widow of deceased soldier.

Her claim was rejected October 14, 1902, on the following stated grounds:

The inability of the claimant, aided by an exhaustive special examination to establish title as the legal widow of the soldier. No record or other evidence found of ceremonial marriage as alleged, and the evidence adduced fails to establish a common-law marriage between claimant and soldier.

She appealed from that action October 18, 1902, contending that there was a ceremonial marriage between herself and soldier, and that on their wedding trip they lived as husband and wife in the State of Pennsylvania, and therefore, under the laws of that State, they became husband and wife.

The facts, in brief, are substantially as follows:

Soldier and claimant had known each other from childhood, and were close friends all their lives. After his return from the service he expressed to claimant's mother a desire to marry her daughter, this appellant, which request was refused on the grounds of his ill health.

Sometime afterwards they concluded to elope, or to have a secret marriage ceremony performed. Pursuant to such agreement, they, on the morning of the 7th of September, 1899, repaired to a house in Baltimore, where, according to claimant's statement, they were united in marriage by a Methodist minister named Smith or Elliott, using the Methodist ceremonial rites, she basing her belief that the ceremony was being performed by an ordained minister on what soldier told her. Leaving the place where they were married, they went to Camden Station, Baltimore, and from there by rail to the city of Philadelphia, Pa., visiting some friends of soldier, and riding about the city until 5.55 p. m. of the same day, when they returned to Balti-

more, she going to her home and he to his. They commenced house-keeping some six days afterwards, and continued to live together as husband and wife until soldier's death, July 25, 1901.

They had one child as the fruit of their marriage, such child being born July 16, 1901. No license for their marriage was issued, nor was any "return" of such marriage, as is required by law, ever made.

It is also noted that soldier, in a statement to a special examiner, made at a time when his claim for a pension was being investigated, said that he and claimant were married at the home of a Mrs. Alexander, in Baltimore, and in the presence of a Mrs. Kopps, in September, 1898, and that such marriage was celebrated by a minister named Smith.

In affidavits filed prior to special examination of her claim, appellant stated that the officiating minister's name was Elliott; to the special examiner she explained that she was so agitated and excited over the marriage that she probably did not understand or remember the minister's correct name, and that her husband was mistaken as to the time and place of the marriage.

No witnesses to said marriage have been found, and the proof of same consists entirely of the statements of claimant and deceased soldier, and their subsequent conduct, and the special examiner reported them as of good repute, and as being respectable people of reputable families.

Under the facts, any contract of marriage that was entered into by them was made and entered into in the State of Maryland, and therefore must be governed by the laws of that State.

The contention of appellant that their sojourn of a few hours in the State of Pennsylvania, while on a presumptive wedding tour, was such a living, cohabiting, and holding themselves out to the public of that commonwealth as to constitute a common-law marriage under its laws, is so unstable and untenable that it does not merit consideration; however, the question of the legality of their marriage in the State of Maryland assumes a more serious aspect.

The laws of that Commonwealth provide that a marriage to be valid must be consummated by some religious ceremony, and that no lawful marriage can be contracted merely *per verba de presenti* or *per verba de futuro cum copula*, although the statutes do not declare marriages void because they have not been celebrated in the manner prescribed by statute, and the fact that a ceremony was performed is not always required to be strictly proved.

The court of appeals of Maryland, in the case of *Richardson v. Smith* (80 Md., 189), held:

In this State there can not be a valid marriage without a religious ceremony, but a marriage may be completely proved without the testimony of witnesses who were present at the ceremony. It would work a cruel injustice in many instances if the law were otherwise. The witnesses might be dead and competent written evidence

of the ceremony might be unattainable. It would not follow, however, that the union between the parties would be considered illicit and the children illegitimate. The law has wisely provided that marriage may be proved by general reputation, cohabitation, and acknowledgment. When these exist it will be inferred that a religious ceremony has taken place, and this proof will not be invalidated because evidence can not be obtained of the time, place, and manner of the celebration of the marriage. On this point we think it unnecessary to do more than quote from *Redgrave v. Redgrave* (28 Md., 97): "Where parties live together ostensibly as man and wife, demeaning themselves toward each other as such and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. *Taylor's Ex.*, sec. 140,517; *Hervey v. Hervey* (2 W. Bl., 877); *Goodman v. Goodman* (28 L. J., ch. 1); *Jewell v. Jewell* (1 Howard, U. S., 219, 232). Indeed, the most usual way of proving marriage, except in actions for bigamy, is by general reputation, cohabitation, and acknowledgment. *Sellman v. Bowen* (8 Gill v. John., 50); *Boone v. Purnell* (28 Md., 607)."

In the case of *Jackson v. Jackson* (80 Md., 176) the court held that marriage might be proved by general reputation, cohabitation, and acknowledgment in all cases save those of criminal conversation and prosecution for bigamy, notwithstanding the law of Maryland was to the effect that by the law of the State a valid marriage could not exist unless celebrated by a religious ceremony; and, in discussing the cited decisions, the Department held, in the case of *Rebecca Wiley* (10 P. D., 304):

It appears that the same proof which will establish a marriage valid at common law in States where the validity of such marriage is conceded will establish the presumption of a religious ceremonial marriage in the State of Maryland.

The statutes of the State of Maryland do not provide the particular kind and character of religious ceremony necessary to create a valid marriage, nor as to the particular priest, preacher, or minister by which it must be performed; nor has the court of last resort in that State laid down any definite rules governing the same. On the contrary, all its decisions have given the statutes as liberal a construction and as wide a latitude as the circumstances will permit, without losing sight of the fact that their marriage laws are hampered by a provision requiring that a marriage, in order to be valid, must be celebrated by a religious ceremony; and in all decisions handed down by the Maryland courts, in cases where the issues are similar to those in the case at bar, they have rested on evidence as to cohabitation, repute, and representation, without regard to the length of time such a cohabitation, repute, and representation have covered.

Notwithstanding the fact that the claimant has failed to produce evidence other than her own, and the statements of her deceased husband as to the time, place, and character of the alleged ceremony—conflicting, as they have been—the Department is of the opinion that these defects are cured by the strong presumptions which obtain in Maryland that the marriage was lawful and valid. It might seem, upon a casual sifting of the testimony, that the claimant should be

compelled to explain why her memory is so at fault, and her husband's statements, as well as her own, are so contrary and conflicting; but when the testimony is considered from every point of view, the Department can not, in reason, come to any other conclusion than that the soldier and the claimant's marriage contract was entered into in absolute good faith, and that there was actually a religious ceremony performed prior to their entrance into the connubial state.

These parties had been sweethearts in childhood, had maintained a close and intimate relation through their youth, and were only hindered from an open and public marriage by reason of the objection of the claimant's parents to the ill health of the soldier. A secret marriage appears to have been decided upon, all of the details thereof being carried out by the soldier; and it is not strange, but on the contrary, quite the natural thing, that the claimant should not be able, at this day, to recollect with any degree of certainty the persons present, their names, or even the actual place in which the ceremony was performed. The nonprocuring of a license would be a most natural part of a secret marriage, for had one been procured publicity would have been the immediate result, and in the absence of a license the concealment of the name of the person who performed the ceremony would naturally follow, for were such person known the statutes of Maryland would subject him to a penalty.

It is hardly possible to imagine that this soldier, under the circumstances as hereinbefore set forth, should have deliberately seduced the girl with whom he had been so tenderly associated since childhood; and if such a thing were possible it is harder still to believe that this soldier would have died without having his own and claimant's marriage status absolutely settled, and in a legal manner. The good repute, standing, and character of the parties to the marriage, together with the fact that they lived together as husband and wife openly and avowedly; their long antinuptial acquaintance, the parental objections to their marriage, and the stringent laws of the State governing parties who marry persons not having a license to wed, all show, unquestionably, that soldier and claimant evidently were clandestinely married, the marriage being solemnized by a religious ceremony, performed by some person duly authorized, whom soldier sought to and did protect, by hiding his identity.

To hold that this marriage was void in light of all the facts and law would be squarely against equity and morality, and would necessitate a conclusion not contemplated by the laws of Maryland.

It is accordingly held that the evidence in this case establishes the fact that the claimant and soldier were married according to the law of the State of Maryland, and it follows that the claimant is the widow of the soldier through whom she seeks pension.

The action appealed from is reversed.

DIVORCE—DECREE—RECORD—MARRIAGE—EVIDENCE.

MARY E. NOBLE (WIDOW).

Soldier filed a libel for divorce against claimant. The record shows that the case came to trial, that the court found for the libellant, and ordered that a decree to that effect be prepared. No formal record of decree appears to have been prepared or filed.

Held, That soldier was legally divorced from claimant, who is therefore not his widow, said divorce being effective by the order of the court alone and not affected by the lack of a formal record of decree, which is merely evidence of the order of the court, having no effect of itself.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 31, 1904.

Daniel R. Noble, late private in Troop L, Eleventh Pennsylvania Volunteer Cavalry, a pensioner under the act of June 27, 1890, died November 19, 1898.

February 5, 1901, Mary E. Noble, as widow of the above-named soldier, applied for pension under the act of June 27, 1890.

November 13, 1902, the Bureau rejected this claim on the ground that soldier had procured a divorce from the claimant on or about December 23, 1892, and that she therefore was not his widow.

January 2, 1903, this claimant having previously filed a request for a reconsideration of the above action and said request having been denied by the Bureau, an appeal from the action of rejection and the Bureau's refusal to reconsider same, was filed in this Department.

In this appeal the claimant contends that the divorce proceedings referred to in the rejection of her claim were abandoned; that there was never any formal decree, and "that said alleged divorce was never consummated."

In support of her contention she cited a letter, now in the case, written by the clerk of the superior court of Washington, for the county of King, in which he stated that records of the case of Daniel R. Noble *v.* this appellant, "show that there was never any formal decree of divorce filed," and also stated that there is nothing of record to show what disposition was made of this case by the court on the trial which was held on December 23, 1892.

The letter above referred to contains both correct statements and misstatements of fact. The records in regard to this case have twice been examined by special examiners of the Bureau, and there are now in the case two transcripts of said records. These transcripts show that in the suit in equity above referred to, docket No. 21, page 186, case No. 13835, the proceedings were entirely regular. The complaint, præcipe, and affidavit were filed August 10, 1892, and on the same date a summons for publication was issued. Thereafter the usual

course in cases of service by publication and default was followed. The case came to trial December 23, 1892, as was ordered by order entered December 10, 1892, and after an examination of witnesses on the part of the plaintiff the court found for plaintiff and ordered that a decree to that effect be prepared. Beyond this stage no further proceedings appear to have been had, and, as stated in the letter of the clerk of the court, heretofore referred to, no formal decree appears to have been prepared or filed. The report of the special examiner who last examined the records in regard to this case shows incidentally that the attorney who prosecuted the suit for divorce died soon after the date on which same was granted. It is also shown that said attorney was a dissipated person. These facts are probably the reasons why no formal decree has ever been entered in the case. This failure on the part of the attorney, while it leaves the record in regard to the case incomplete, does not, however, in any degree affect the force of the decree which took effect immediately after being pronounced by the court.

It was the order of the court that the parties be divorced that sundered the marital tie between them. A decree spread upon the records of the court is simply evidence—the best evidence—of the order of the court, and nothing more. It does not operate in itself to divorce people; it merely evinces the order of the court to that effect.

The appellant stated in her appeal that she was “prepared to prove that the aforesaid divorce proceedings were founded upon and carried on as far as they went by perjury and fraud.” Whether the facts in the case support the above statement is not a question for the Department to consider. As before stated, the proceedings on their face appear to have been regular and proper, and while they remain undisturbed in the courts of the State of Washington the appellant can have no status here as the widow of the soldier; no more than she could be recognized in the State of Washington as the widow of the complainant in the suit in question.

The action of rejection must be considered to have been proper and the same is, therefore, hereby affirmed.

If, as the appellant alleges, fraud and perjury can be shown to have been practiced in obtaining soldier's divorce, then a remedy is open to her by proper application and procedure in the courts of the State of Washington, and if by said courts the bar to her legal status as the widow of the soldier therein raised is removed, then she will be at liberty to again come before the Bureau and the Department for a further consideration of her claim for pension.

MARRIAGE—SLAVES—SOUTH CAROLINA LAWS—EVIDENCE.

CELIA ROBINSON (WIDOW).

While slaves, in South Carolina, lacked civil capacity to effect a marriage in its contractual sense, still there was a distinction between a "moral marriage," entered into with the master's consent, and an illicit and unlicensed sexual connection. The act of December 21, 1865, did not pretend to institute a new relation between slaves cohabiting as husband and wife, but merely "established" (i. e., confirmed or ratified) a marriage relation previously existing, lacking only the element of contractual capacity for its perfect consummation.

Where slaves, between whom a moral marriage with the consent of the owner had been perfected prior to emancipation, were living together as husband and wife on December 21, 1865, the moral marriage was ratified and established, with all the civil effects of a marriage duly celebrated between freemen. But the evidence must point unmistakably to a prior existing moral marriage as distinguished from an unauthorized and illicit connection between the parties.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
May 31, 1904.*

Herewith are returned the papers in the case of Celia Robinson, widow of Peter Robinson, sergeant, Company A, One hundred and fourth U. S. Colored Volunteer Infantry. Said Celia was a pensioner under the act of June 27, 1890 (certificate No. 398382), from July 19, 1890, to December 3, 1901, when she was dropped from the roll on the following stated ground:

That it is shown by the evidence on file adduced on special examination that under the law of the State of South Carolina the pensioner was not the legal wife of the soldier who rendered the service, as his former slave marriage to one Susan Ancrum is held to be legal and binding, as he and she sustained the relation of husband and wife up to the date of his enlistment (May 7, 1865), and upon his discharge (February 5, 1866) he returned to her and they resumed marital relations and were thereafter recognized as husband and wife up to the time of their final and definite separation.

On January 30, 1903, through her attorney, claimant appealed from this action. In the appeal attention is called to the act of 1872, the effect of which was passed upon by this Department in the case of Patsey Washington (8 P. D., 362). It is contended that the facts in these two cases are practically identical, and that the action from which the present appeal lies is directly contrary to the said decision in the Patsey Washington case.

It is contended on the part of the Pension Bureau that soldier had a slave wife, one Susan, with whom he lived until his enlistment; that constructively he was living with her in the marital relation during the term of his enlistment, which embraced the date of December 21, 1865, and that upon discharge he returned to her, resuming his former relation to her as husband.

On December 21, 1865, the legislature of South Carolina passed an act (13 Stat. L., 269), which, among other things, provides as follows:

1. The relation of husband and wife amongst persons of color is established.
2. Those who now live as such are declared to be husband and wife.
3. In case of one man having two or more reputed wives, or one woman two or more reputed husbands, the man shall, by the 1st day of April next, select one of his reputed wives, or the woman one of her reputed husbands, and the ceremony of marriage between the man and woman and the person so selected shall be performed.
4. Persons of color desirous hereafter to become husband and wife should have the contract of marriage duly solemnized.
5. Cohabitation, with reputation and recognition of the parties, shall be evidence of marriage in cases civil and criminal.

The ethical and the legal aspects of the sexual relations of slaves were carefully considered in the Departmental opinion in the case of *Annie Hughes* (8 P. D., 455). While in its civil and contractual import slaves were barred from marriage, yet their sexual relations were recognized as legal or illicit according to the manner in which they were entered. Particularly is this true of South Carolina. No law of that State forbade the formal intermarriage of those in the state of bondage. While they might not enter it as a civil contract, no law, but merely their condition, prevented it. The slave was not a mere chattel, but a human being, endowed with certain natural rights, which he was at liberty to enjoy in so far as such enjoyment did not interfere with the paramount right of his owner. The relation that the State bore to the free white individual the white master sustained to the slave. The master might, to a certain extent, relieve the slave of his civil disability, just as the State might act in relation to the status of one of its citizens. With the master's consent slaves might intermarry, and at his behest the marriage might be dissolved. Such a marriage, in all its moral aspects, was the same as that contracted between freemen. Without the master's assent marital relations between his bondsmen were illicit and morally reprehensible.

This principle was recognized in the case of *Clement v. Riley* (33 S. C., 66), wherein it was held that where slaves were "morally man and wife," and in slave times one left the other for another spouse, not being separated by the master's power, there could be no marriage between them, the second connection being illicit.

In *Davenport v. Caldwell* (10 S. C., 317), the court said:

There is no law forbidding marriage among slaves, but the intention of slavery made the right of property in the master paramount, and natural marriage could not be allowed to interfere with that power, but was absolutely subject thereto, and could be annulled at will; but that did make it necessarily, and ab initio, a nullity between the parties. * * * It is well known that the marriage among slaves having no binding legal effect, they were separated by their owners for good cause shown, or by sale, especially in the distribution of estates, and that being thus released or separated and removed from each other, the moral contract between them

was regarded as released, and subsequent marriage of the parties to others was allowed and encouraged. In this way a man or woman may have had several wives or husbands, all alive, and yet be free from all blame, for they had a right to regard such separation of persons in their condition as equivalent to a divorce or release—a vinculo matrimonii. In such cases, who, under the first section (i. e., the act of 1865, *supra*), would, amongst the living, be husband and wife, for they had all married? The second section meets the exception and enacts “that those who now live as such are declared to be husband and wife.”

In the case of *Clement v. Riley*, *supra*, in discussing this act of December 31, 1865, the court said:

As it strikes us, it could not have been the intention to create marriage relations which in fact never existed, so as to affect the rights of inheritance. The law does not undertake to make the marriage contract; that must be the act of the parties themselves, the law only declaring the consequences. As we understand it, the purpose was to remedy a case where the parties had agreed to occupy towards each other a relation of husband and wife, that is, a moral marriage, lacking only the power of contract to make it legal. The existence of such was generally shown by a public ceremony, but that was not indispensable. It might be proved by the declarations, or conduct of the parties, as evidence from which such contract might be inferred. But, as we think, such conduct or declarations, to be of much force upon that question, should be of such a nature as to point unmistakably to a previous contract of marriage. * * *

It was not the intention of the acts of the legislature, establishing and regulating the domestic relations of persons of color, to legitimize the whole colored race, but only to legalize such marriages as were morally good but not legal for want of power in slaves to make a binding contract. Where two slaves of the same plantation live together for many years, without any public ceremony of marriage, or any conduct or declaration pointing unmistakably to a previous contract of marriage, and then separated, the issue of such connection are not the legal heirs of their father.

Both in *Davenport v. Caldwell*, *supra*, and in *Knox v. Moore* (41 S. C., 355), it was held that the act in question did not confer the right of marriage in future, but acted retrospectively upon such marriages moral in their nature, but illegal in a contractual sense by reason of the servitude of the parties. The defect in such marriages, under conditions prescribed by the act, was cured by this legislation.

The word “establish” as thus used, may be interpreted to signify “recognized, acknowledged, ratified, and confirmed.” (*Davenport v. Caldwell*, *supra*.)

In other words no new relation was instituted, but an old relation was ratified and confirmed.

In *State v. Whalley* (10 S. C., 500) the court held:

The fact that at the date of the passage of the act of 1865 the defendant and Pleasants were living together as man and wife under a marriage solemnized while they were slaves, if established to the satisfaction of the jury, brought the case within the second section of that act.

Substantially the same holding was followed in *Myers v. Ham* (20 S. C., 522).

The act of 1865, then, has relation to such cases only where a moral marriage existed in the days of slavery. Such moral marriages were confirmed or established in those instances where, upon the passage of the act, the parties were living together as husband and wife. It certainly did not convert an illicit connection into a valid marriage. From the mere fact that a man and woman were cohabiting in slavery, and at the date of the passage of said act, it by no means follows that on and after December 21, 1865, they became lawfully married. If they had not been morally married before, they were not legally married after the passage of said act.

To defeat the appellant's claim, then, it is necessary to show that the soldier and one Susan Ancrum were morally married in slave times, and that they were living together by reason of said marriage as husband and wife on December 21, 1865. It is not sufficient to show that he was merely cohabiting with a woman, or even with the consort of his slave days; it must be shown that there was actually a moral marriage between them. The proof thereof must be so certain that were this Susan's claim, her coverture and widowhood would be readily accepted.

Margaret E. Carpenter deposed that Peter Robinson, the soldier, was one of her former slaves. She says that it was her understanding that Peter had a slave wife called Susan. Susan did not belong to her family, and she did not know to whom she did belong. She never saw her; she did not know whether her name was Susan Ancrum or not. She had heard Peter Robinson speak of her as his "wife." There is no testimony that Peter and this Susan ever obtained the consent of their masters to a ceremony of marriage, or that they were ever ceremonially married. No one testifies that they lived together as husband and wife during the period of their bondage, that they held themselves out as such, or that they were so regarded by their owners and by the community as morally married. The most that Mrs. Carpenter knew was that Peter had spoken of a wife named Susan.

There is no evidence whatever connecting the Susan of whom Mrs. Carpenter speaks with the Susan Ancrum with whom it is alleged that soldier lived for a few months subsequent to his discharge. It is not certain even that soldier did live with any Susan Ancrum as man and wife after his discharge. Some time after his term of service had expired, according to the testimony of Mary Ann Tumor, Peter came to the house where Mary Ann lived. A colored woman named Susan Ancrum lived in the same house. Soldier and this Susan lived together as husband and wife, according to this witness; he recognized her as his wife, she recognized him as her husband. The witness considered that they were lawfully married. When asked if they had lived together as man and wife in slave times, the witness thought that they must have so lived; but her belief was founded not on knowledge, but

on inference from the fact that soldier came to her after his discharge. The witness asserts that after soldier had married Celia she asked Susan if she and he had not been married. She said that they had been man and wife in slavery times, but had never gone through a ceremony before a preacher. This admission is significant as bearing upon the nature of their relation in slave times, assuming that she is the Susan of whom Mrs. Carpenter spoke. It points not to a moral marriage, because with few exceptions a religious ceremony was performed in those cases where the marriage was permitted by the owners and recognized as a lawful slave marriage as distinguished from an illicit and meretricious connection. As the court said, in the case of *Clement v. Riley*, *supra*, that "while a ceremonial marriage was not absolutely essential, still, when proof of the moral marriage depended upon conduct, etc., such conduct or declaration, to be of much force upon that question, should be of such a nature as to point unmistakably" to the alleged moral contract of marriage. Mrs. Tumor also remembered the fact that this Robinson and Susan, both belonging to the Centenary Methodist Church, were respondents in a church trial. They were accused of living together without being married. Neither was expelled, however.

Celia Robinson, the claimant, in relation to this matter deposed as follows:

I married soldier in December, 1866. Rev. Francis Smith (colored) performed the ceremony. I married soldier on Robb's lot, King street, Charleston, S. C. I had never been previously married nor lived with any man. I had been acquainted with soldier for about a year, as near as I can get at it, before I married him. He had been living with a woman named Susan before he married me. I can't tell whether he lived with her before the war or not, but he lived with her after he came out of the army. They lived together on King street, near Price's alley. When soldier asked me to marry him I was told by different "class women" of my church that Peter Robinson was living with a woman named Susan. Her name was Susan Ancrum, but she might have been called Susan Robinson also. I can't tell about that. I asked soldier about this woman and he denied that he was living with her. I and my mother went to see Susan. I stayed outside on the street and my mother went in the house to see Susan and they had a talk. I did not hear the conversation but the purpose of my mother's visit was to learn if Susan had married the soldier. Of course if he was already married I did not feel that he could marry me. When my mother came out she told me that Robinson was not living with Susan and that they were not married. Susan came to the gate with my mother and she said to me, "No, child, he is not living with me." I afterwards told Bull Boat Wright, a class leader in Centenary Church, that I had heard that Peter Robinson was living with a woman, and I told Wright that I did not want Robinson to go with me any more. The church people took it up and summoned Robinson, who was a member of the church, and they had a trial of some kind. I don't know what the accusation against Robinson was. After the trial Bull Boat Wright came to my house and said to me, "Peter Robinson is not married and is privileged to marry anybody he wants to." I afterwards married soldier at the time and place mentioned. Susan, the woman I have been talking about, was living at the time I married Peter Robinson and she lived for several years after soldier's death.

The claimant has no knowledge that soldier was married to any woman by slave ceremony, or that he lived with Susan or anyone else in slave times, as husband and wife, or that soldier and said Susan ever held each other out to the world as husband and wife.

It is, of course, apparent that soldier and Susan were not actually living together in any relation on December 21, 1865. Soldier's military service, it will be remembered, extended from May, 1865, to February, 1866. But, it is contended, he was "constructively" living with her in December, 1865. Logically, if Robinson had been the husband of six different slave wives, and was not actually living with any one of them on December 21, 1865, "constructively" he would be living with all six. It can not be gainsaid that a man may constructively be living with a woman although bodily absent. But in such cases there must be first of all proof of an actual marriage before it can be said that he is constructively living with her as her husband. In the case at bar there is no competent evidence whatever showing that an actual marriage, either before or after emancipation, ever took place between this man and any woman other than the appellant.

While it is undoubtedly true that in all instances where slaves, morally married prior to emancipation, were living together as husband and wife on December 23, 1865, irrespective of the operation of the statute passed in 1872 in the State of South Carolina, became legally married, and in this respect we find no error in the position taken by the Bureau, the Department is of the opinion that you did err on the question of fact involved in this case, namely, in assuming that soldier's relations with Susan were at any time such as to constitute a moral or a valid marriage.

There having been no bar to claimant's marriage with the soldier in December, 1866, she is entitled to restoration from date of dropping. Action reversed.

PATHOLOGICAL SEQUENCE—GUNSHOT WOUND, MALARIAL POISONING AND DISEASE OF SPINE—LOCOMOTOR ATAXIA OR ATAXIC PARAPLEGIA.

GEORGE W. WHEELER.

This claimant's disease of the spinal cord being, under the evidence and medical authorities cited, of uncertain diagnosis and etiology, but a disease which, however diagnosed, may, under said medical authorities, be possibly due pathologically to one or more of the causes on account of which he is pensioned, and other possible causes of such disease being shown by the evidence not to exist or to have existed, a pathological connection between said disease and said causes on account of which he is pensioned should be held to be sufficiently established in his claim for increase on account of said disease alleged as such result.

A medical sequence need not more than any other fact be established beyond all doubt, but a reasonable probability from all the facts, circumstances, and conditions shown that a certain pathological relationship exists in the case is sufficient.

In determining the question of such probability the opinions of the medical division of the Pension Bureau are only advisory to and not binding upon either the Commissioner of Pensions or the Secretary, whose sole and exclusive province it is to decide all such questions for themselves upon the entire evidence, such opinions, and medical authorities.

Refusal to reopen a rejected claim for increase upon affidavits filed more than 90 days after notice of such rejection is proper under the rules of practice, and such affidavits may not properly be considered on appeal as to the merits of said rejection.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 31, 1904.

This appellant, George W. Wheeler, was a member of Company I, One hundred and forty-sixth New York Infantry, from August 29, 1862, to July 16, 1865, and is now pensioned, certificate No. 96705, at \$17 per month on account of disability from gunshot wound of right side, right inguinal hernia (complete), and malarial poisoning and resulting disease of liver.

A claim for increase filed December 6, 1902, was rejected June 13, 1903, "condition due in part to other than pensioned causes;" and reopening of said claim, upon evidence filed January 26, 1904, was refused January 30, 1904, on the ground that said evidence was not filed within ninety days from date of notification of rejection of said claim.

In this appeal, filed by the pensioner in person on March 21, 1904, there is no specific assignment of error in the action appealed from, but the appellant merely requests a—

review of the decision of the Bureau of Pensions, rejecting petitioner's claim to an increased pension, and refusing to reopen the case upon the affidavits of Dr. Willis E. Ford and Dr. J. G. Kilbourn.

While this would not ordinarily constitute a valid appeal under the rules of practice, yet, in view of the fact that it is filed by the pensioner himself, and that he is practically helpless physically from a serious disease of the nerves, it may be entertained in order that speedy justice be done him.

While he has not, either in this appeal or in the appealed claim, assigned any specific reasons why he believes himself to be entitled to an increase of his pension, it is apparent from the history of the case and the facts shown that the increase is claimed because of said nerve disease as a result of the causes on account of which he is now pensioned.

In a prior claim for increase, filed March 15, 1895, he alleged that said accepted causes had resulted in, and that he was entitled to increase because of, "partial paralysis of the limbs," and in several subsequent claims that he was entitled to increase because of locomotor ataxia or "total disability in both limbs."

In rejecting, in September, 1895, it was held merely that there were "no further special results of the accepted causes." In May, 1899, it was held that "locomotor ataxia was not alleged as of service origin," and on August 15, 1899, the medical referee held, on submission by the First Deputy Commissioner, that—

The chief cause of disability in this case is locomotor ataxia or posterior spinal sclerosis, which is not one of the pensioned disabilities and which can not be accepted as a result of any disability admitted in this case as of service origin.

Again on April 26, 1900, "impaired use of both legs (was) not accepted as a result;" and in rejecting the appealed claim, it was held the pensioner's "condition (was) due in part to other than pensioned causes."

It is apparent, therefore, that the gist of the appealed claim and of the appeal lies in the question as to this condition from supposed locomotor ataxia or disease of the nerves, and a proper review of the rejection of said claim necessitates the determination of this question.

A careful review of the facts in this case shows that there is considerable doubt as to the diagnosis made of this pensioner's disease of the nerves.

While some examining boards, and even some of his own physicians, diagnose it as locomotor ataxia, or tabes dorsalis, other official examining surgeons and other of his own physicians (aside from those whose affidavits were filed subsequent to the action appealed from, and which will be noticed later herein) diagnose it as an ataxic paraplegia, which is etiologically and symptomatically different from locomotor ataxia or tabes dorsalis.

The importance of a correct diagnosis in this case lies in the fact that the usual predominating causes of locomotor ataxia or tabes dorsalis appear to be other than the causes on account of which this claimant is now pensioned; while said latter causes are not infrequently those common in the etiology of ataxic paraplegia or spastic ataxia or combined sclerosis of the spinal cord, as it is variously called (Church-Peterson on Nervous and Mental Diseases, p. 421).

A differential diagnosis of the various spinal sclerosis is difficult in practice, however distinct symptomatically such diseases may be in theory; as the neurotic manifestations are, in many cases, variously combined and involved, some being those of one form and others those of another form of sclerosis. This is especially true of ataxic paraplegia, which presents "a combination of the symptoms of spastic paraplegia and locomotor ataxia" (Potts-Gallaudet, Nervous and Mental Diseases, p. 225).

Locomotor ataxia is characterized usually by incoordination of movements, various sensory and trophic disturbances, and impairment of the special senses, especially the eye; and is a "para-syphilitic" disease, from 75 to 90 per cent of the cases having a history of syphi-

lis, although "excessive fatigue, sexual excesses, and exposure to cold and wet are apparently causes in some cases" (*ibid.*, p. 190-191). Traumatism also has been assigned as a cause, but "many cases attributed to (it) have been misinterpreted cases of organic indeterminate or combined cord lesions" (Church-Peterson, *supra*, p. 391). And while syphilis may be eliminated in 10 per cent of the cases of *tabes dorsalis*, the actual cause of the disease in this 10 per cent is very uncertain of determination in any case.

In the combined cord lesions, however, while a history of syphilis is frequent, it is much less frequent than in *tabes dorsalis*; and cold, traumatism, concussion, muscular strains, and acute infections may be accepted as probable causes more certainly in such cord lesions than in *tabes dorsalis*.

In Potts-Gallaudet, *supra*, page 225, it is stated that "a history of syphilis is rare" in ataxic paraplegia; exposure to cold, traumatism, and sexual excess have appeared to act as causes; and in many cases no cause can be traced.

While *tabes dorsalis*, therefore, is classed as a para-syphilitic disease, ataxic paraplegia is not so classed, although there is a syphilitic form of it; and other causes than syphilis may be held to be more probable causes of a combined cord lesion, especially if syphilis be eliminated in the history of the case.

As to the differential symptoms of the combined sclerosis, Church-Peterson, *supra*, page 422, state:

The symptoms of the combined sclerosis are those of spastic paraplegia and locomotor ataxia variously combined and associated. One case shows a preponderance of ataxia, another of spasticity, depending upon the distribution and intensity of the lesion in the posterior or lateral columns and upon its vertical extent. Lesions of these tracts give us, on the part of the posterior columns, incoordination, an ataxic gait, Romberg's sign, diminished or lost reflexes, lancinating pains, anesthetics and paresthesias, ocular symptoms, vesical and genital derangements, etc. Related to the lesions of the lateral tracts, we have exaggeration of tendon reflexes, foot clonus, motor enfeeblement, cramps, spasms, and the spastic gait. By their association in postero-lateral sclerosis we usually find ataxia and spastic weakness, with increased tendon reflexes, well marked in the lower limbs, less pronounced in the upper extremities, and cranial nerve symptoms are seldom entirely absent.

Tabes dorsalis is, itself, a progressive and long continuing disease, "extremely insidious and its course very slowly progressive," leading to total helplessness (*ibid.*, p. 415); but a combined sclerosis "is much less rapid in its course than *tabes*, and the great majority of cases never become entirely unable to walk," rarely causing death, but resulting generally in bed sores, cystitis, and kidney disease (*ibid.*, p. 423).

As to the general diagnosis of this "progressive spastic ataxia," these authors say, page 424:

In early stages when the ataxia is prominent it is usually mistaken for *tabes*, but the muscular weakness, the increased reflexes, the insignificant sensory disturbances,

the absence of girdle pains, and visceral crises should at once differentiate it. In later stages when the paraplegic features are preeminent the ataxia is lost in the motor extinction, but a history of it can usually be had.

And as to the prognosis, they say (*ibid.*):

The slowly progressive tendency of the disease has been sufficiently insisted upon. Stationary periods, or those comparatively so, are very common, and even improvement in the individual features of some cases are not infrequent. Complete relief, in the nature of things, is an impossibility, and the onward course of the paretic and spastic features is taken up sooner or later. Mental disturbance, while uncommon, may appear and paretic dementia ensue. Every case is to be judged by itself. The rapidity or slowness, of course, in the early years of the malady is likely to mark it throughout.

Potts-Gallaudet, *supra*, pages 225-226, give the following symptomatic history of this disease:

The onset is usually gradual, but may be rapid. The patient first notices that he tires easily, and that in turning suddenly there is a tendency to fall. Difficulty may be experienced in walking in the dark. The Romberg symptom is present, and the tests employed to detect incoordination reveal its presence in the legs and at times also in the arms. The gait is different from that of tabes, but equally unsteady. * * * Muscle-sense is usually affected as in tabes. The lightning pains of tabes are absent. Dull pain in the sacral region, or higher up, is usually complained of. Girdle pain is rare. Sensation is commonly not impaired. Visceral crises are unknown. The skin reflexes may be increased, normal or diminished. The knee jerk is much increased, and ankle-clonus can frequently be obtained. When the arms are affected a similar condition of reflexes is observed.

Sexual power is lost early and the sphincters are often impaired; sometimes there is inability to empty the bladder.

Eye symptoms, either of the muscles or nerve, are usually absent. As the disease advances the ataxic symptoms become overshadowed by those of spastic paraplegia, but evidences of incoordination can be found if looked for.

Late in the disease mental symptoms similar to those of paretic dementia may develop.

* * * * *

The disease can be distinguished from tabes by the preservation of the knee jerks, existence of ankle clonus, difference in gait, and absence of lightning pains and eye symptoms; from spastic paraplegia, by the unsteadiness of the gait.

There is also a combined sclerosis, due to or associated with "a cachexia, and sometimes with pernicious anemia and other toxic conditions, as influenza, chronic diarrhea, lead poisoning, and malaria" (Potts-Gallaudet, *supra*, p. 230). This is a more rapid disease than either tabes or ataxic paraplegia, but is characterized by most of the symptoms peculiar to the latter; and as this claimant is pensioned also for malarial poisoning, the possible influence of malarial poisoning can not be overlooked in diagnosing and determining the causes of his disease of the nerves.

The history of this claimant's case, as shown by the evidence herein, is as follows:

He was captured at the battle of the Wilderness, May 5, 1864, after being wounded in the right side of the back, for which he received no

medical treatment for three weeks, he says. He was then taken to Andersonville prison, Georgia, and later paroled, reporting at Parole Camp, Annapolis, Md., where he was furloughed, and was then treated by Dr. Luther Guiteau, at his home, from about January 1, 1865.

On December 21, 1868, he claimed pension on account of said wound, and same was allowed in March, 1869, at \$4 per month. Doctor Guiteau then testified to treatment from January 1, 1865, for said wound, "which was causing him at the time much suffering in his side and back," and which the examining surgeon found in 1869 "troubles him whenever he lifts anything heavy; is unable to lay on that side; complains of weakness of side; also tenderness."

In a claim for increase, filed in February, 1872, he alleged three ribs were broken by the ball causing said wound. Medical examination under that claim in 1873 showed the wound healed, but tender and painful, with the same general disability from it as on the prior examination. Another examination in 1875 also showed tenderness of wound, with "at times twitching of the muscles in line of wound; pain and soreness, when lifting, of parts wounded; can not lay on that side for any length of time without suffering from numbness of the side." In 1877 substantially the same conditions were found, and it was also stated two ribs were fractured by the ball, and that "changes of weather cause pain and numbness." In 1878 the same surgeon repeated substantially the former statements, dwelling upon the fact that any exertion, particularly bending forward, produced severe pain in the line of the wound, that the latter was always sensitive to pressure, and was greatly affected by the weather. In 1880 and 1883 very deficient examinations were made, no disabling conditions being described.

On February 13, 1890, he filed a claim alleging, as also of service origin, malarial poisoning and scurvy, resulting in disease of heart, liver, kidneys, and rheumatism. On examination in May, 1890, under that claim the wound was found to be still sensitive, with loss of tissue and adhesions at sites of entrance and exit; sensitiveness over stomach, liver, and spleen, none over spine or sciatics, and no evidence of rheumatism, but "has pain in his limbs."

In April, 1893, the claimant, being stated to be unable to leave his home, was examined there, and the surgeon found at the scar of the wound loss of tissue, sensation, and adhesions; sensitive over liver, stomach, and spleen; liver enlarged, skin sallow, tongue furred gray, digestion fair, "not a distinctive malarial cachexia," no difficulty of speech or swallowing, some pain in spine, sensitive from occiput to coccyx, feeling of numbness in legs below knees, tired feeling particularly in knees and ankles, has had lightning-like pain in legs, none at present, coordination impaired, exaggerated with eyes closed, not

able to stand with closed eyes, general tremor, especially in hands, falls easily, does not attempt to walk nights, straddles in walk, at times cramping in thighs, pricking sensation in calves, slight ptosis both eyes, can not differentiate points at 4 inches on calves, but feels pain in about two seconds, soles feel as if stepping in tar, then on feathers; *tabes dorsalis*, "probably due to injury of back."

In 1895 the regular board examined claimant and diagnosed the nervous disease as a "passive congestion of the spine," with no difficulty in swallowing, pain over middle of spine, no sense of constriction, slight paralysis of sensation in left leg and thigh, staggering with eyes closed, tending to the left, coordination fair otherwise, muscular tremor in left arm and hand, but can use both without great difficulty, "no history of spinal injury; the paralysis has been coming on for fifteen years;" no signs of syphilis, temperate, no bad habits.

Another board examined him in 1897 and found increased hepatic dullness, abdomen retracted, not tender, splenic dullness increased in area, tender on pressure; malarial poisoning and disease of liver, halting and unsteady gait, unable to walk without aid, marked atrophy of all muscles of extremities, band-like constriction about body and numbness of extremities complained of, marked muscular tremor, great lack of proper muscular coordination; "tendon reflex markedly exaggerated;" disease of spine and general paralysis; no evidence of vicious habits.

A member of the board of 1895 again examined claimant in 1899, and diagnosed the disease of nerves as a "disseminated sclerosis and paralysis," due to said wound of back. "This man," he says, "is paralyzed and mind wanders; has to be turned in bed; bed sores on body;" history not obtainable, except from attending physician; no evidence of syphilis; never addicted to drugs; always temperate.

Eight months later another surgeon examined him and diagnosed locomotor ataxia, or ataxic paralysis. He found, however, all ocular apparatus apparently normal and vision excellent, pupils equal and responsive; liver contracted; spleen normal; no tenderness; tongue coated; skin pallid, shriveled, and dry; extreme emaciation and cachexia; general muscular atrophy from constant disuse; arms and legs shrunken and skinny;

he describes complete locomotor ataxia, but can not stand or walk; tremor of all extremities; loss of tendon reflexes; claims sensation of formication and tingling; no spinal tenderness; can not dress or undress; incontinence of urine; no other disease of brain, cord, or meninges; no convulsions; no evidence of vicious habits, and disclaims any skin, throat, bones, and nervous system are free from any evidence of syphilis; no scars on genitals or in groins; no glandular enlargements; no history of alopecia or cutaneous eruptions; no signs of syphilitic taint.

Another surgeon in 1903 also diagnosed this disease as locomotor ataxia, but there was no sense of constriction; severe pain in back; paralysis of lower extremities; none of bowels or bladder; no cystitis,

hyperesthesia, or anesthesia; slight numbness of limbs; marked atrophy of latter; unable for five years to stand or walk; can not move limbs without aid; no evidence of, and denies ever having malarial poisoning.

The wound itself is described in the various certificates as beginning $1\frac{1}{2}$ inches to the right of the first lumbar vertebra and ending 4 or 5 inches to the right upward in the axillary line, striking and fracturing or grooving the tenth and eleventh ribs, producing thickening and joining of those ribs and loss of tissue and adhesions, and, as stated by the surgeon in 1900, loss also of "bone at scar of entrance where lower border of rib was notched." Both scars were tender even on the last examination.

Dr. O. B. Richards testified in 1891 that he had been claimant's physician since Doctor Guiteau's death in 1885; that claimant up to 1888 or 1889 was one-half disabled by general debility, due to malarial poisoning of periodic symptoms, which yielded to malarial treatment; that these symptoms were rather premonitory, as in all febrile disturbances, than regular, with pain in the back and lower extremities, languor, lassitude, gastric irritation, loss of appetite, vomiting, frequent micturition, complaints of alternate coldness and heat, sweating, etc.; was very nervous, liver and spleen enlarged, varied and numerous neuralgic affections, palpitation of the heart, rheumatic pains in limbs and joints; the last two years anæmia and nervous symptoms rapidly progressed, indicating disease of the spinal cord or locomotor ataxia, unsteadiness of gait, especially at night, legs close together and eyes shut, sways, falls unless supported, gait peculiar, more like one suffering from primary lateral sclerosis, legs generally kept close together, toes trail or drag, often stumbles, walks as if on springs, sensibility little, if at all, impaired, muscular twitchings, no rigidity, exalted patellar-tendon reflex marked, atrophy of muscle not found in this disease. "To my mind there is a complex form of the disease or of combination of this disease with others; for instance, a combination of posterior and lateral sclerosis."

In another affidavit, September 7, 1897, he states:

At present his condition is as follows: Thin, with but a very little if any muscular atrophy. In walking, the knees are considerably bent, the legs are rigid, and the feet are not lifted from the floor, but pushed along, the toes clinging to the ground. When he sits down it is with difficulty that he arises, on account of stiffness of the muscles. The legs tremble and there are cramps in them at night occasionally. In handling the legs I find them resisting, owing to muscular contractions. The patella and ankle reflexes are very much exaggerated. He has no pain or anesthesia and no rectal or vesical disorders. So far my diagnosis is spastic spinal paralysis.

To the examining board in 1897 claimant stated he contracted locomotor ataxia and partial paralysis in service, and to the board, in 1900, that he was wounded in the Wilderness, imprisoned in Andersonville immediately after, and "since then have had numbness and tingling of feet, with ataxic gait, increasing until in 1898 I became totally helpless—unable to walk about."

C. E. Price, a comrade in prison with claimant, being called on for details as to claimant's disabilities, stated in his reply, filed April 22, 1891, that at discharge claimant complained of rupture and that "his limbs were weak and trembly when he was on his feet any length of time;" that he has suffered more or less ever since, "and his hand shakes or trembles so I have to write for him at times;" and also, in an affidavit filed, September 7, 1897, that claimant "has suffered with his limbs ever since" discharge.

Jerome B. Watkins also testifies, September 14, 1897, that claimant has "constantly complained" since service "of the wound near the spine; also of numbness in his limbs, spine, and head."

Claimant's physician, D. H. Roberts, made affidavit, filed January 13, 1893, that claimant was unable to go to the board for examination because of locomotor ataxia in rapidly progressive form, causing unsteady and staggering gait.

Dr. Leander Swartwout stated in affidavit filed in January, 1894, that he never treated claimant, but had conversed frequently with him since he had known him in 1880, as to his condition, and that claimant was a constant sufferer from chronic muscular rheumatism. In another affidavit, filed September 7, 1897, he states he knows claimant to have suffered for many years with locomotor ataxia, although he repeats, he has never treated him.

Dr. M. W. Slocum, September 7, 1897, states he had treated claimant for two years, for sclerosis of the posterior column of the spinal cord, that claimant's walk was spastic, muscles of his lower limbs considerably wasted, "contractions go on all the time," muscles of the face have undergone some paresis, no sensory disorders.

And on April 6, 1903, Dr. W. K. Quackenbush stated claimant had been under his care since October, 1900, and that

he has locomotor ataxia in such form as to render him completely helpless. Same followed gunshot wound of back. Whole body affected by same. * * * Body is fairly nourished. His diet is one that gives no trouble, being easily assimilated. His habits are good.

As to the two affidavits, filed to reopen the appealed claim, it need only be stated that refusal to reopen said claim upon said affidavits was proper under the rules of practice, said affidavits having been filed more than ninety days after notice of rejection of said claim. (William W. Wilds, 11 P. D., 95.) And while said affidavits may not be considered as evidence herein, it may be stated that both these affiants, who are known to be reputable physicians, diagnose claimant's disease as a sclerosis of the spinal cord probably due to said wound, either through inflammatory action or exostosis.

It is manifest from the foregoing (excluding said last-mentioned affidavits) that this claimant's case presents a variety of symptoms—some indicative of locomotor ataxia, others of ataxic paraplegia, or a

combined lateral and posterior sclerosis. In view of the general absence of sensory disturbances, particularly of eye symptoms, and of any syphilitic taint or history, the presence of exaggerated reflexes, the fact of traumatism, injuring the ribs and tissue in the near locality of the apparent lesion of the cord, and the fact of exposure and hardship, and malarial poisoning in service, a diagnosis of combined sclerosis of the cord would appear to be not alone warranted, but fairly established.

But whether the disease be *tabes dorsalis* or a combined sclerosis, no satisfactory reason appears why it should not be accepted herein as a probable sequela of the causes on account of which this claimant is pensioned. The mere fact that syphilis is a factor in the vast majority of tabetic cases, and perhaps in many cases of combined sclerosis, can not militate against a person whose condition and history negative syphilis as a factor in his disease; and if other possible causes of such disease are shown to exist, the inference is natural and reasonable, if not necessary, that such disease was, in fact, due to such other causes. As stated in Church-Peterson, *supra*, "every case is to be judged by itself" as to its prognosis, and it can be no less as to its etiology. The possible cause of syphilis being eliminated, as it may be in 10 per cent of tabetic cases and probably in a much larger per cent of cases of combined sclerosis, and as it is, in fact, in this case, this claimant's sclerosis of the cord must be held due either to the traumatism, exposure to wet and cold, and malaria, shown to have existed in this case, and admitted by medical authorities to be possible, though more or less rare, causes of sclerosis, particularly of the combined form which he seems to have, or else due to some other and unknown cause. The known should certainly prevail over the unknown and the eliminated possible causes. There is no law or rule of reason which requires that a medical sequence, any more than any other fact to be established in a pension claim, be shown beyond all doubt. A reasonable probability, from all the facts, circumstances, and conditions shown, that a certain pathological relationship existed should be sufficient.

As to what is a reasonable probability in any case depends, of course, upon a variety of things—the inclusion, by the evidence, of some things; the exclusion, by the evidence, of other things; a comparison of one thing with another, considered from diagnostic and etiological standpoints; the relative influences and forces exerted physiologically, psychologically, and pathologically.

Upon such questions medical authority and advice are of course indispensable, whether the question arise in a court of law or in a pension claim; but the Commissioner of Pensions and the Secretary are no more bound in deciding such a question by an opinion rendered by the medical division of the Bureau of Pensions than a court would be in deciding the same question by the medical opinions of experts

testifying before it. As experts may not give "inferences to be drawn from the whole trial, for this would be to invade the province of the jury" (3 Wharton & Stille's Medical Jurisprudence, p. 731), so, although the medical division of the Bureau of Pensions may render opinions upon the medical features of the whole case before it, and although such opinions are entitled to the greatest respect and consideration, they are advisory only, and are not binding upon either the Commissioner of Pensions or the Secretary, for "this would be to invade the province" of these officers, who alone have by law the determination of all questions of fact arising in the adjudication of a pension claim, and in determining which, each acts as a jury passing upon the whole case. This has been for years the settled holding of the Department as to the province and jurisdiction of the Commissioner and the Secretary in relation to medical questions. (Lucinda Gaskell, 3 P. D., 87; Josiah T. Tuttle, *ibid.*, 52; John J. Hill, 7 P. D., 142; Samuel Nook, 8 P. D., 367; Julia A. E. Watkins, 10 P. D., 202, 208; William Blaisdell, 13 P. D., 465, 479.)

So reviewing this case, it is held, on the evidence, that the claimant's disease of the spinal cord is satisfactorily established as due to the disabling causes on account of which he is pensioned, and increase should be allowed accordingly. The rejection of the appealed claim is therefore reversed, and you will readjudicate said claim in accordance with this holding.

SERVICE—JOINT RESOLUTION JULY 1, 1902—FAITHFUL SERVICE—HONORABLE DISCHARGE—DESERTION.

JOHN VEIRS, ALIAS WILLIAM DOWDELL.

Soldier had three terms of service, from the first of which he was never honorably discharged. His second term of service, from which he was honorably discharged, covered a period of about eight months. He was also honorably discharged from his third term of enlistment, after a service of four months and twelve days.

"Last contract of service," the term employed in said resolution, must be taken in its literal sense. Consequently, soldier's last term of service being less than six months, he is excluded from the benefits of said resolution according to the terms of the proviso to the second section thereof.

*Assistant Secretary M. W. Miller to the Commissioner of Pensions,
June 4, 1904.*

Herewith are returned the papers in the case of John W. Veirs, alias John B. Veirs, alias John Veirs, alias William Dowdell, who served in Company D, Fourth Kentucky Cavalry; Company K, Ninety-first Indiana Infantry; and Company K, Thirty-third Indiana Infantry, in the war of the rebellion.

Claimant was at one time a pensioner under the act of June 27, 1890 (certificate 667819). On March 19, 1902, he was dropped from the rolls, on the ground that he had not been honorably discharged from Company D, Fourth Kentucky Volunteer Cavalry, being a deserter at large therefrom. On August 1, 1902, he applied for restoration under the terms of the joint resolution of July 1, 1902. On November 19, 1902, you rejected this claim on the ground that his last contract of enlistment was less than the six months mentioned in the proviso of said resolution. He appealed, and on January 15, 1903, this Department affirmed your action.

This is a motion for reconsideration of said departmental decision. It was filed on March 17, 1904, and has been made special.

Concisely stated, the facts are these:

Soldier enlisted in Company D, Fourth Kentucky Volunteer Cavalry, on October 20, 1861, and deserted therefrom December 10, 1862. He was never honorably discharged from this term of service.

On August 3, 1863, he enlisted in Company K, Ninety-first Indiana Volunteer Infantry, for a six months' term of service. He was honorably discharged therefrom March 23, 1864, after a faithful service of nearly eight months.

For a third time he enlisted, on March 9, 1865, in Company K, Thirty-third Indiana Infantry. From this service he was honorably discharged July 21, 1865, the war having terminated. This last "contract of service" covers four months and twelve days.

In spite of the equities of the case, a mere reading of the second section of the joint resolution aforesaid shows how ineffective it is to afford that relief, in this particular case, which it may well be argued that it was designed to accomplish:

SEC. 2. That in the administration of the pension laws any enlisted man in the Army, including regulars, volunteers, and militia, or any appointed or enlisted man of the Navy or Marine Corps, who was honorably discharged from the last contract of service entered into by him during the late war of the rebellion, shall be held and considered to have been honorably discharged from all similar contracts of service previously entered into by him with the United States during said war: *Provided*, That such enlisted or appointed man served not less than six months under said last enlistment or appointment, that his entire service under said last enlistment or appointment was faithful, and that he did not receive by reason of said last enlistment or appointment any bounty or gratuity other than from the United States in excess of that to which he would have been entitled if he had continued to serve faithfully until honorably discharged under any contract of service previously entered into by him, either in the Army, Navy, or Marine Corps, during the war of the rebellion.

In the rehabilitation of the soldier's military record, for purposes incident to the administration of the pension laws, it is expressly stated in said resolution that an honorable discharge "from the last contract of service * * * during the war of the rebellion" shall operate honorably to discharge the soldier from "all similar contracts of serv-

ice previously entered into by him," provided, among other things, that "said last enlistment" involved a service of not less than six months.

The facts in this case obviously exclude appellant from the benefits of the resolution. As it was well said by counsel in the appeal, the soldier is deprived of a pension "because of too much faithful service." Were it not for his last enlistment, his service of seven months and more in Company K, Ninety-first Indiana Volunteers, from which he was honorably discharged, would have operated, under the terms of this resolution, to give him a pensionable status. It is not unlikely that Congress meant, by "last contract of service," "any subsequent contract of service." But, unfortunately for the appellant, it did not say so. By "last contract of service," in this particular case, we can not, without torturing out of the word an entirely different meaning, understand that any service other than that in the Thirty-third Indiana Infantry is meant. And as this term of service was less than six months, the conclusion is too obvious to require even its statement.

Where the language of a statute is plain and unambiguous we may not depart from its terms in order to effectuate a hypothetical intention. The intention must be gathered from the plain terms of the statute itself. In violating this cardinal principle of statutory construction a court is doing more than merely construing a statute, it is legislating.

The principle was admirably stated by Mr. Justice Brewer in *United States v. Goldenburg* (168 U. S., 95):

The primary and general rule of statutory construction is the intent of the law-maker to be found in the language that he has used. * * * The courts have no function of legislation. * * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

The apparent lack of equity in the Bureau's action, affirmed as it was by this Department in the decision of January 15, 1903, is consequently due, not to an error in the construction of a statute but to a defect inherent in the statute itself. The proper source of redress then is the lawmaking power and not a law-construing tribunal.

Motion overruled.

MARRIAGE—IMPEDIMENT—AGE—EVIDENCE—MICHIGAN LAWS.

JENNIE ATHERTON (WIDOW).

Claimant married soldier, by ceremony, on March 21, 1869, cohabiting with him as his wife, in the State of Michigan, till his death on March 28, 1899. She had previously, when probably under age, married one Townsend, and it is also probable Townsend had, at the time, a living undivorced wife. Townsend died December 25, 1875.

Held. Under the statement of fact a marriage between claimant and soldier must be presumed. (*Barker v. Valentine*, 125 Mich. 336.)

The opinion in the case of *Harriet Comstock* (10 P. D. 220), so far as it conflicts with the holding in the case of *Barker v. Valentine*, is hereby expressly overruled.

Assistant Secretary M. W. Miller to the Commissioner of Pensions, May 28, 1904.

On June 2, 1899, Jennie Atherton, of Gaines Station, Mich., applied for a pension under the general law, alleging that she was the widow of Rufus Atherton, late of Company K, First United States Volunteer Sharpshooters. This claim was rejected by the Bureau on August 7, 1902, as follows:

Approved for rejection: Claimant has no title as legal widow of soldier because her marriage to him on March 21, 1869, was void at inception, as she had a husband, Moses Townsend, then living, from whom she had not been legally separated and who did not die until 1875, and no change of circumstances made the marriage of 1869 valid.

An appeal from the foregoing action was entered on February 21, 1903.

It appears that claimant was formally married to one Moses Townsend in the State of Michigan on January 20, 1858, and was married in conformity with the statutory regulations to the deceased soldier on March 21, 1869. Townsend died December 25, 1875, and the soldier on March 28, 1899. It is in evidence that the parties to the latter marriage lived and cohabited together as husband and wife during the thirty years intervening until the death of the soldier; were known as such by their relatives and the residents of the little village where they lived, and in all respects recognized and respected the obligations and duties growing out of the marriage relation. Several children resulted from this cohabitation, and the soldier recognized their legitimacy in his will, and referred therein to the claimant as his wife.

Mrs. Atherton testifies that she was but 14 years old when she married Townsend, and left him shortly afterward upon learning that he had an undivorced wife living. She insists that said marriage was void: First, because Townsend was not competent to enter into a contract of marriage, and second, because said marriage was not ratified by her, as required by the statutes of Michigan, after she arrived at the age of 16 years. Neither of these facts, however, are clearly shown by the evidence, though her statement as to her age is uncontradicted, and there is record evidence in corroboration of her assertion.

But irrespective of questions concerning the validity of her first marriage, it seems clear that under the decisions of the courts of Michigan, this claimant is the legal widow of the deceased soldier Rufus Atherton. Form and ceremony are not essential to a valid marriage in that State (*Hutchins v. Kimmell*, 13 Mich., 126; *Peet v. Peet*, 52 Mich., 464; *Williams v. Kilburn*, 88 Mich., 279). In the case

of *Hutchins v. Kimmell*, *supra*, Mr. Justice Cooley, speaking for the supreme court of Michigan, said:

Where parties agree presently to take each other for husband and wife, whatever the form of ceremony, or if all ceremony be dispensed with, and from that time live together professedly in that relation, this, under the laws of this State, constitutes a valid marriage.

In a recent decision the same court, in the case of *Barker v. Valentine* (125 Mich., 336), held that under circumstances such as appear in this case a subsequent marriage following the removal of the impediment will be presumed. This decision grew out of a contest over the proceeds of an insurance policy on the life of one George Valentine between his sister, the appellant, and Margaret I. Valentine, appellee, his reputed wife. Prior to Valentine's marriage to Margaret in 1885, he was married to one Ida in the State of New York, who survived his second marriage five years. The evidence failed to show that the parties to the first marriage were ever divorced, though it appears that a proceeding for that purpose was begun by Valentine. The latter died in 1896, and the appellee then first learned of the impediment to their marriage. This fact was affirmatively found by the court. After discussing the facts in the case, and the former decisions of the court, in conclusion, it was said:

The legal impediment to a marriage between these parties, if it had not been removed before, was removed by the death of Ida Valentine in October, 1889. The parties after that date resided and cohabited together. Mr. Valentine applied for insurance, in which he declared he was married, and named his beneficiary, Margaret I. Valentine, his wife. They were regarded and treated by their relatives and neighbors as husband and wife. Mr. Valentine was a carpenter by trade. He was ill a long time before his death. The testimony is that Mrs. Valentine treated him kindly, gave him his medicine, and did all those things a wife would be expected to do for her husband. No question was raised after the death of Ida Valentine but that Margaret Valentine and George Valentine were husband and wife, until his death, 7 years after the legal impediment had ceased to exist. Under such circumstances their marriage must be presumed.

The facts in the case at issue are in many respects similar to those of *Barker v. Valentine*. Claimant and soldier lived together as husband and wife for 24 years after the death of Townsend, several children were born to them, and the soldier recognized her as his wife in his last will and testament. But one material difference appears in the two cases. Mrs. Valentine was innocent of any wrong, while in this case, if any fraud was perpetrated or wrong was knowingly committed, it was by this claimant. The evidence, however, indicates that she was innocent of intentional wrong doing. She asserts that she believed her former marriage was void, and if her statements are true, either as to her age or the circumstances attending the separation, it was void. That the earlier marriage was not hid from her soldier husband is shown by the certificate of their marriage. She was married under the name of her first husband, and the record

shows the fact of an earlier marriage. There is nothing to indicate any fraud or intentional wrong doing on her part, or that her husband was in any manner deceived, or was unacquainted with the truth. Following the decisions of the Supreme Court in the case of *Barker v. Valentine*, *supra*, a marriage in the case at issue will be presumed.

The rejection of this claim was based upon the Departmental decision in the case of *Harriet Comstock* (10 P. D., 220). This case was decided before the supreme court of Michigan had passed directly on the question here at issue. Its recent decision quoted has made it necessary for the Department to modify to some extent its former holdings, and so much of the *Comstock* case as may be in conflict with this decision is overruled.

The rejection of this claim, for reasons given, is reversed.

INDEX TO DECISIONS.

ABANDONMENT.

See DEPENDENT PARENTS, 271.

ABSENCE FROM COMMAND.

See LINE OF DUTY, 114.

ABSENCE.

See SERVICE, 257.

ACCIDENTAL INJURY.

See LINE OF DUTY, 81, 203, 506.

ACCRUED PENSION.

See DISLOYALTY, 422; REIMBURSEMENT, 152.

ACT OF MARCH 3, 1879.

See LIMITATION, 489.

ACT OF AUGUST 7, 1882.

See ADULTEROUS COHABITATION, 84, 362; LEGITIMACY, 474; MARRIAGE, 38.

ACT OF MARCH 19, 1886.

See INCREASE, 95.

ACT OF AUGUST 4, 1886.

See AMPUTATION, 264; RERATING, 215.

ACT OF JANUARY 29, 1887.

See HONORABLE DISCHARGE, 195; INCREASE, 155; SERVICE, 357.

ACT OF MARCH 4, 1890.

See COMMENCEMENT, 209.

ACT OF JUNE 27, 1890.

See COMMENCEMENT, 69; DECLARATION, 7, 426, 434; DEPENDENCE, 281, 360; DISCHARGE, 380; HELPLESS MINOR, 331; MARRIAGE, 99, 344, 347, 383, 445, 497, 527; SERVICE, 63, 257, 296, 298, 326, 346, 352, 388, 413, 515.

ACT OF JULY 27, 1892.

See SERVICE, 13, 296, 408.

INDEX TO DECISIONS.

ACT OF JANUARY 5, 1893.

See COMMENCEMENT, 40, 420; INCREASE, 285.

ACT OF FEBRUARY 5, 1897.

See COMMENCEMENT, 420.

ACT OF MARCH 3, 1899.

See DIVISION OF PENSION 1, 45, 120, 127, 130, 136, 313, 334, 338, 367, 394, 404, 472, 479, 521; LIMITATION, 24; MARRIAGE AND DIVORCE, 17, 43.

ACT OF APRIL 23, 1900.

See COMMENCEMENT, 40.

ACT OF MAY 9, 1900.

See DEPENDENCE, 80, 281, 360.

ACT OF MARCH 3, 1901.

See RESTORATION, 111, 128, 194, 198, 318, 411, 438, 452.

ACT OF JUNE 27, 1902.

See SERVICE, 13.

ACT OF JULY 1, 1902.

See FEB, 276. Joint Resolution July 1, 1902.

ACT OF MARCH 2, 1903.

See RATES, 508, 524; RERATING, 215.

ADMISSIONS.

See ADULTEROUS COHABITATION, 84.

ADULTEROUS COHABITATION.

1. The admissions or confession of the claimant in this case do not show such conduct on her part as would bar her, under the act of August 7, 1882, from a pension under the provisions of the act of June 27, 1890, as the same was not open and notorious.

Emily Claggett (widow) 84

2. The only evidence of open and notorious adulterous cohabitation by claimant is her reported confessions to a special examiner, which she swears she never made, but that said special examiner falsely put the same in her statement and did not read that part of it to her. The evidence taken on a second examination shows claimant to be an upright, moral, and chaste woman, and no person could be found who had even a suspicion that she had committed an immoral act.

Annie Snyder (widow) 219

3. The fact that claimant kept house for a second cousin after his wife's death and lived with him for sixteen years, together with the testimony of one witness who says he saw them both coming out of the same bedroom one morning, is not sufficient to establish the claim that such claimant lived in open and notorious adulterous cohabitation, in the face of the denial of each of the

parties, corroborated by the evidence of the postmaster and the near neighbors of claimant who say they never heard of any immoral conduct between said parties, and that they were considered and believed to be upright, honorable, and moral people. The fact that claimant, prior to her marriage to the soldier, lived for nineteen years with one Burch in the relation of husband and wife and bore him six children, coupled with the fact that they separated and each thereafter married again, and testimony showing that the agreement between Burch and claimant was that they should live together as husband and wife so long as they could agree, is not sufficient to establish a common-law marriage.

Annie L. Tripp (widow) 242

4. The act of March 3, 1901, is dependent in many respects upon prior legislation, but it in no respect repeals or modifies the act of August 7, 1882. The adulterous cohabitation of a widow subsequent to the passage of the act of August 7, 1882, works a forfeiture of her right to a pension under the act of March 3, 1901.

Julia Edington (as widow) 362

AGE.

See MARRIAGE, 554.

AID AND ATTENDANCE.

See COMMENCEMENT, 209.

AMENDMENTS.

See DECLARATION, 434.

The claimant's leg having been amputated below the middle of the thigh bone, and hence not "so near the hip joint as to prevent the use of an artificial limb," he was not entitled to the rate of \$45 per month under the act of August 4, 1886.

Henry M. Capper 284

APPEALS.

See ATTORNEYS, 83, 328; DIVISION OF PENSION, 472; PRACTICE, 364.

ARREARS.

See INCREASE, 155.

ATAXIC PARAPLEGIA.

See PATHOLOGICAL SEQUENCE, 542.

ATTORNEYS.

See also FEE, 276.

Death of principal.

1. Where, during the lifetime of his principal, the attorney of record files an appeal in his behalf, the act being the act of the principal under the law of agency, the appeal is properly before this Department and may not be dismissed on the ground that the death of the principal, subsequent to the filing of the appeal, terminates the relation of principal and agent. In such cases, the filing of the appeal is soldier's act. In those cases where the claimant dies subsequent to the action of rejection and before an appeal has been filed, the power of attorney not surviving, the attorney for claimant may not file an appeal because the agent can not do what his principal can not do; and the

principal, being dead, is unable to take any further step in the prosecution of his claim. (Distinguishing this case from the case of *Bates T. Certain*, No. 115. current series.)

Charles E. Landon 83

Recognition.

2. Where an attorney has rendered no material service in a claim for more than one year and thereby becomes in default, the Bureau may properly refuse to accord him further recognition although the claimant has not appointed another attorney to continue the prosecution of the case.

William H. Rhodes (claimant) 273

3. A claim under the act of June 27, 1890, which has been approved for admission and the issue of certificate is subject to the election of soldier to receive pension under said act, and, when he does not elect to receive pension thereunder, is the same as a rejected claim with respect to the rights of attorneys appearing therein and of those who subsequently file claims for pension under the act of June 27, 1890, in his behalf. The action of the Bureau, therefore, in refusing to accord recognition to the appellant, he being the first to file a valid declaration and power of attorney subsequently to the admission of a claim in which the issue of certificate was subject to the election of the soldier to receive pension under the act of June 27, 1890, which he did not elect to receive, was error.

John Kite (claimant) 269

4. An attorney, in order to preserve his inchoate right to recognition must render some service, at least call up the case at intervals of one year or less until he is formally recognized by the Bureau, or until the claim is allowed.

Robert H. Ball (claimant) 228

ATTORNEYSHIP.

Neglect.

1. When an attorney is in neglect through failure to file evidence in compliance with a call of the Bureau a waiver of compliance therewith subsequently to the appearance of another attorney in the claim does not operate to relieve said attorney of the charge of neglect.

William Easter (claimant) 172

Rule 13.

2. When, upon the rejection of a claim for pension, evidence is filed by a contesting attorney, bearing upon the ground of rejection within the time allotted by rule 13 to the attorney of record to file such evidence, the filing thereof inures to his benefit the same as though he himself had performed the service.

Luther C. Kane (claimant) 328

Substitution.

For the purpose of transferring the attorneyship in a claim for pension by one attorney or agent to another, it is not necessary that an attorney be clothed with power of substitution by the claimant. (Overruling *Esther Geddings*, 36 F. P. L.; Bk., 374.)

Minors of James T. Kyle (claimants) 186

BOUNTY.

See *DESERTION*, 466.

BOUNTY LAND.

Both the soldier and those named in the bounty-land law as successively entitled to receive a warrant on account of his service having died without claiming such warrant, the title thereto has lapsed.

Emie Sullivan (administratrix) 415

BRIEF-FACE.

See PRACTICE, 162.

BURDEN OF PROOF.

See EVIDENCE, 375; MARRIAGE AND DIVORCE, 17.

CALIFORNIA.

See MARRIAGE AND DIVORCE, 265.

CATARRH AND BRONCHITIS.

See PATHOLOGICAL SEQUENCE, 201.

CEREMONY.

See MARRIAGE, 527.

COHABITATION.

See MARRIAGE, 417, 445, 456, 476.

COHABITATION AND REPUTE.

See MARRIAGE IN MASSACHUSETTS, 456.

COLORLED PERSONS.

See MARRIAGE, 156, 288.

COMBINED RATES.

See PRACTICE, 162.

COMMENCEMENT.

See DECLARATION, 7.

Act of March 4, 1890.

1. Where an application for original invalid pension was filed subsequent to March 4, 1890, and the claimant was, at the date of filing such application, so totally and permanently helpless from injuries received or disease contracted in the service and line of duty as to require the regular personal aid and attendance of another person, he is entitled to receive the rate of \$72 per month from said date (of filing the application).

John C. Stevens 209

Act June 27, 1890—Section 4698½—Revised Statutes.

2. Increase under the act of June 27, 1890, must commence from the date of medical examination, as provided by section 4698½ of the Revised Statutes, showing an increased inability to earn a support by manual labor.

John Middleton 69

Act of February 5, 1897—Act January 5, 1893.

3. Members of Gray's Battalion, Arkansas Volunteers, have no right to pension prior to the act of February 5, 1897, and they are entitled to a \$12 rating under the act of April 23, 1900, from such date, when the evidence shows them to be in the physical and financial condition required by the act of January 5, 1893, as held in the case of Markwood. (11 P. D., 380.) Same case in 14 P. D., 285, modified.

Jasper N. Armstrong 420

Act of April, 23, 1900—Act of January 5, 1893.

4. The act of April 23, 1900, in extending all of the benefits of the act of January 5, 1893, to pensionable Mexican war survivors who are entitled to a service pension, carries with it the benefit of having the pension commence from the same date as those under the last-mentioned act; and the rule for such date is found in the opinion in the case of Robert Markwood (11 P. D., 380).

Daniel Evland 40

COMMISSIONER OF PENSIONS.

See MEDICAL EXAMINATIONS, 430.

CONDUCT.

See MARRIAGE, 469.

CONNECTICUT LAWS.

See MARRIAGE, 355.

CONSTRUCTION.

See DIVISION OF PENSION, 338.

CONTRACT SURGEONS.

See SERVICE, 515.

CONTRIBUTIONS.

See DEPENDENT PARENTS, 271.

CRUELTY.

See DIVISION OF PENSION, 394.

DEATH.

See LINE OF DUTY, 213.

DEATH CAUSE.**Epilepsy.**

The evidence shows, in soldier's temperament and constitutional tendencies, a predisposition to epilepsy which developed in the service as the result of an attack of otitis media (suppurative) contracted in line of duty. The predisposition is not a bar to pension; and the widow is entitled under the general law, it being admitted that soldier's death cause was epilepsy. Mere aggravation in service of a preexisting disease is not pensionable; but where a disease develops in service, starting with some injury or ailment incident to line of duty as the proximate efficient cause thereof, albeit there is a preexisting tendency, a natural predisposition, to the disease thus developing, said predisposition does not operate as a bar to pension, if claimant is otherwise entitled.

Laura E. Carrier (widow) 300

DEATH OF PRINCIPAL.

See ATTORNEYS, 83.

DECREE.

See DIVISION OF PENSION, 146; DIVORCE, 535; MARRIAGE AND DIVORCE, 265, 279, 290, 438.

DECREE NISI.

See MARRIAGE, 438.

DECREE OF NULLITY.

See MARRIAGE AND DIVORCE, 265, 290.

DECLARATIONS.

Amendments.

1. A declaration which, although failing to allege any period of service or the correct service of the soldier on whose account it is filed, nevertheless clearly shows, on its face, that it is intended to claim pension, as widow, under the act of June 27, 1890, is a valid declaration, subject to such amendment as may be necessary to adjudication.
Harriet Daniels (widow) 434

Averments.

2. Under the provisions of the third section of the act of June 27, 1890, the averment in the declaration of the organization in which the deceased soldier served is unnecessary, and the allegation when made must be considered merely for the guidance and convenience of the Bureau. An incorrect allegation as to the particular service is not fatal, and when the actual service is ascertained the claim, if rejected, should be reopened and readjudicated.
Jane Cook (widow) 428

Minors.

3. The title of minors to pension under the act of June 27, 1890, is distinct and separate from that of the widow, although secondary to the same. It is therefore held that a widow's declaration, when she has failed to prove title, will not be considered as the declaration of the minors, and the minor's claim will not be adjudicated until an application in his or her own right has been filed.
Martha Apgar (widow) 7

DEFAULT.

See ATTORNEYS, 273.

DELAWARE LAWS.

See MARRIAGE, 527.

DEPENDENCE.

Widows.

1. In computing a widow's net income in determining her dependency within the meaning of the act of May 9, 1900, the rental value of real estate which she occupies, albeit she derives no income therefrom, must be taken into consideration. The claimant in this case, having an income in excess of \$250 when the rental value of the house in which she lives is included in computing her income, is not pensionable within the meaning of the act.
Maria Ann Hofrichter (widow) 80
2. The evidence shows that the claimant owns property which does, or should, if prudently managed, yield a net income exceeding \$250 per annum. Held: That she is not entitled to pension under the above-named acts.
Nettie C. Lutes (widow) 281
3. The evidence establishes that the claimant is not dependent, within the meaning of the amendatory act of May 9, 1900, she having a net income of \$325 per annum.
Josefa Taylor (widow) 360

DEPENDENT RELATIVES.

See also **LEGITIMACY**, 474.

Contributions.

1. Claimant, a criminal and crook, served in some prison from the time his son was 4 months old until his death; never saw or heard of him but once during that period; never contributed to his support, nor did said son, who was 21 years old when he died, ever acknowledge his obligation to, nor did he contribute to his father's support. He can not therefore be held to have been dependent on said son, whom he abandoned, for support within the meaning of the pension laws.

William Connell 271

Means of support.

2. When it has been determined that a mother or father of a deceased soldier was dependent on him for support as provided by section 4707 of the Revised Statutes, and the proof shows that the minor brothers and sisters had no independent means of support, their dependency follows as a necessary consequence; and upon the death of the parents, or the death of the father and remarriage of the mother, they become entitled to pension on proof of relationship and such other proof as may be necessary to negative the last proviso of said section.

Dottie May Demaree (sister) 4

3. A mother who has a healthy husband 29 years old, who earns, when he works, from \$1.50 to \$2 per day, and a son 16 years old, whose earnings she is entitled to, is not dependent within the meaning of section 4707 of the Revised Statutes. It was not the intention of Congress to pension the mother of a soldier if she has an able-bodied husband who lives with her and is shown to be able to support her, although he may not be able to provide luxuries.

Cora Gee, now Stolworth (mother) 267

Illinois—Husband and wife.

4. By statutory enactment the State of Illinois has made the separate estate of husband and wife liable for the "expenses of the family," whether incurred by husband or wife. Reflexively this statute, while defining a creditor's rights, operates to give to a husband such an interest in his wife's estate that the extent, character, and value of her said estate become material in the determination of the dependency of a father.

Thomas J. Dolan (father) 294

DESERTION.

See also **DIVISION OF PENSION**, 45, 130, 146, 159, 191, 394, 404, 521; **SERVICE**, 352, 502, 552.

JOINT RESOLUTION OF JULY 1, 1902.**June 27, 1890.**

1. The "bounty or gratuity" specified in the second section of the joint resolution of July 1, 1902, comprises only those additional governmental benefits conferred or compensations paid, other than pay and pensions, for or on account of military service rendered or to be rendered, and does not include the consideration paid to a substitute soldier by his principal under their private contract whereby the former agrees to serve in the place and stead of the latter.

Bridget Whelan (widow) 380

2. The evidence satisfactorily establishes that the soldier did not receive any bounty or gratuity other than from the United States, upon his enlistment in Com-

pany D, Twelfth Kentucky Infantry, and having served for six months under his last enlistment and been honorably discharged therefrom, and his entire service thereunder having been faithful, he comes within the provisions of the joint resolution of July 1, 1902.

Jonathan King 466

DIFFICULTY AND TROUBLE.

See **FEE**, 199.

DISABILITY.

Permanent and specific—Rating.

1. The evidence shows that the claimant was totally and permanently disabled in his left hand by a gunshot wound at the date of his medical examination, August 14, 1865, and continuously since, and he is entitled to the specific ratings provided by law.

William H. Wormstead 182

2. Claimant having been pensioned at the rate of \$24 per month from the passage of the act of March 3, 1883, for gunshot wound of right thigh and resulting paralysis of leg and foot, resulting in total disability such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot, he must have been totally disabled in the leg and foot and entitled to the rate of \$40 per month provided by the act of March 2, 1903. The Bureau having conceded his right to the benefits of said act, the increased rate of pension must commence from the approval of the act.

Cornelius F. Groner 508

DISCHARGE.

See **DESERTION**, 380, 466; **SERVICE**, 249, 413.

DISCHARGE WITHOUT HONOR.

See **SERVICE**, 413.

This soldier having been discharged from service under special order mustering out his organization because of its refusal to obey orders, and such discharge being held by the War Department to be a discharge without honor, he was not honorably discharged from such service, and is not pensionable under the act of June 27, 1890.

John H. Ricketts 283

DISEASE OF SPINE.

See **PATHOLOGICAL SEQUENCE**, 542.

DISHONORABLE DISCHARGE.

See **DISCHARGE WITHOUT HONOR**, 283.

DISLOYALTY.

See also **DECLARATION**, 426; **FEE**, 276.

Joint resolution of July 1, 1902—Section 4716, R. S.—Accrued pension.

1. Where a soldier died prior to the passage of the joint resolution of July 1, 1902, removing bar to payment under section 4716, Revised Statutes, as applied to the act of June 27, 1890, said resolution affords no remedy to those claiming under him in all cases where his right to pension had not been admitted, said

suppositive personal right to pension dying with him. But where a soldier's claim had been admitted and his right to pension, so far as section 4716, Revised Statutes, is concerned, had never been questioned in his lifetime, his widow may not be refused payment of his accrued pension subsequent to the passage of said joint resolution, upon the ground that he had rendered voluntary service to the Confederacy, a fact discovered after soldier's death.

- Rebecca Medlock (widow)* 422
2. The evidence fails to rebut the presumption, from the records of the War Department, of this soldier's voluntary aiding and abetting the rebellion. He having died prior to the passage of the joint resolution of July 1, 1902, removing the bar of section 4716 as applied to the act of June 27, 1890, said joint resolution has no effect upon his claim under said act, and does not remove said bar existing at the time of his death so as to entitle his widow to accrued pension under said claim.
- James H. Kelley* 104

DIVISION OF PENSION.

See also MARRIAGE AND DIVORCE, 17, 43; PRACTICE, 8.

Desertion.

1. Where the husband, by his cruelty and abuse, drives his wife from the matrimonial home it may be presumed that he intended to effect a separation by his own wrongful and illegal acts. The one who intentionally drives the other away is the deserter. *Rothery v. Rothery* (11 P. D., 77-377); *Barnett v. Barnett* (27 Ind. App. 471).
- Lockard v. Lockard* 45
2. The evidence in this case fails to establish the fact that pensioner deserted claimant or that he was the party in fault for the separation. Where the wife, by her cruelty and misconduct, drives her husband from her, it may be presumed that she intended to effect a separation by her illegal acts. The one who intentionally drives the other away is the deserter. *Rothery v. Rothery* (11 P. D., 77, 377); *Whitney v. Whitney* (Ibid, 301); *Lockard v. Lockard* (14 P. D., No. 12, current series); *Barnett v. Barnett* (27 Ind., 471); *Warner v. Warner* (54 Mich., 492); *Lea v. Lea* (99 Mass., 493). Drafting affidavits for both parties and their witnesses and administering the oath as a notary public do not raise the presumption that the person performing said acts is the attorney for either party, nor is he thereby disqualified from subsequently becoming the attorney for either of the parties in a claim for division of pension under the act of March 3, 1899.
- Hendershott v. Hendershott* 130
3. The husband, having deserted his wife, can not, by offering her a home elsewhere (which he does not possess), constitute her the deserter merely because she refuses to follow him. The evidence in this case fairly shows that pensioner deserted his wife, and that she is legally justified in refusing to renew the suspended marital relations.
- Kendell v. Kendell* 159
4. Where pensioner, at the date of his wife's application for one-half his pension under the first proviso of the act of March 3, 1899, and at the date of the alleged desertion, was adjudged insane, it is incumbent upon the wife, in order to establish desertion under said act, to show that her husband, at the date of the alleged desertion, was capable of understanding and entertaining an intent to desert her, as intent is an essential element in desertion. "Desertion begins with the intent to desert." *Martin v. Martin* (13 P. D., 430.)
- Burnham v. Burnham* 191

5. The wife who, by her cruelty, drives her husband from home is herself the deserter. Cruelty was, at the common law, cause for a decree of separation. Cruelty, as it relates to the marital status, is any conduct on the part of either of the married parties as endangers the life, body, or health of the other and renders cohabitation unsafe or intolerable. False charges and a persistent course of jealous conduct on the part of the wife without cause, following her husband about, employing detectives to do so, and attempts to humiliate, exasperate, and insult him amount to such cruelty as would justify a separation without subjecting the husband to the charge of marital desertion within the meaning of the act of March 3, 1899.

Demo v. Demo..... 394

6. Pensioner's contention that he did not desert claimant is not sustained by the evidence in this case. A wife deserted by her husband is, under the laws of California, entitled to her own domicile. *Moffatt v. Moffatt* (5 Cal., 281); *Hardenberger v. Hardenberger* (14 Cal., 654).

Byrns v. Byrns..... 404

7. Pensioner's bill for divorce was based upon the fact that he had been living apart from claimant without any cohabitation for five consecutive years next before his application. The question of marital desertion was, therefore, not involved in the judicial proceedings or passed upon by the court granting him a decree of divorce. Where a husband leaves his wife and fails to contribute to her support and without procuring a divorce from her, or, believing her to be dead, marries another woman, the law will presume, in the absence of proof to the contrary, that he intended to desert his wife. Pensioner having left claimant and the matrimonial domicile, it is incumbent upon him to show that he was legally justified in so doing, in order to relieve himself of the charge of desertion. So much of the Bureau action of April 1, 1904, as held that "pensioner is not legally chargeable with marital desertion for any period prior to February 17, 1904," the date on which he procured a divorce from claimant in Kentucky, is not sustained by the evidence.

Jones v. Jones..... 521

Domicile.

8. Claimant having been paid one-half her husband's pension under an application, void because prematurely filed, the pensioner is entitled to be reimbursed the one-half pension thus wrongfully withheld from him, less an overpayment made him after his wife had filed a valid application which was properly allowed and to which she was legally entitled. Where, after an ex parte special examination of claimant and her witnesses, the case is reopened and another special examination ordered, of which pensioner is duly notified, but declines to avail himself of his right to be present in person or by attorney, he is estopped to allege as error the lack of notice in the prior special examination. Pensioner's contentions that claimant is not his lawful wife; that he did not desert her, but that she deserted him, and that he did not have notice of the special examination or an opportunity to present his witnesses and cross-examine claimant and her witnesses, are not sustained by the evidence in this case. Claimant, having been deserted by her husband, was entitled to her separate domicile. His marital duty required him to return to her in order to terminate the period of his desertion, and if upon his return to her domicile with the offer to resume marital relations she was legally justified in refusing to accept his offer, she is not chargeable with desertion by reason of such refusal. The fact that pensioner's suit against claimant for divorce, commenced in 1900, is still pending, affords no sufficient reason for further delaying the consideration of his appeal or directing further special examination.

Clarke v. Clarke..... 479

Evidence.

9. The evidence in this case, filed by pensioner as a basis for reopening of claim, is not newly discovered, but is mainly cumulative in character, and the affiants and pensioner testify to a legal conclusion rather than to the facts upon which they base their conclusions.

Crissey v. Crissey..... 334

Moral character.

10. The mere fact that claimant married a second husband under the belief that her first husband was dead, does not justify the rejection of her claim for one-half her first husband's pension upon the ground that she was not a woman of good moral character, even though her belief was not well founded.

Post v. Post 177

11. The evidence in this case fails to establish the fact that claimant was, at the date of filing her application, a woman of good moral character. Good moral character is established, *prima facie*, by proof of good reputation by witnesses who know the general reputation of the claimant, but this *prima facie* proof is outweighed by proof of acts of such immorality as are wholly inconsistent with good moral character, and when such acts took place prior to the passage of the act of March 3, 1899, the question as to whether the testimony is too remote is one of discretion. The act of March 3, 1899, is in no sense a penal statute, yet in ascertaining the beneficiaries under the grant of one-half of a pension which has been allowed, the act is strictly construed. Neither the beneficiaries under said act of March 3, 1899, nor the pensioners are entitled, as a legal right, to a special examination, but when a special examination is ordered in a claim under the act, both parties or their attorneys are entitled to due notice thereof, unless the examination is directed through the criminal section of the Bureau, or for the purpose of securing evidence on which to base or prosecute a civil or criminal case.

Nutt v. Nutt..... 338

Naval Home.

12. There is no authority under the act of March 3, 1899, for dividing the money benefits granted by act of March 2, 1867 (section 4756, Revised Statutes), and allowing or paying one-half thereof to the wife of a sailor, on the ground that he is an inmate of the Naval Home, at Philadelphia.

Williams v. Williams 1

Necessitous circumstances.

13. By the term "necessitous circumstances" in the act of March 3, 1899, as applied to the condition of the wife, is meant her need of those necessities which are suitable to her situation and her husband's condition in life, and which he is bound to provide, or for which he is liable on an implied contract in case he fails to provide. The financial, physical, and social condition of the pensioner are facts to be considered in connection with the other facts in the case in determining the actual necessitous condition of the claimant under the act of March 3, 1899. Pensioner is 81 years of age, wholly incapacitated for earning his support by manual labor, and with no means of support aside from his pension of \$12 per month. Claimant is 57 years of age, able to earn \$4 per week by manual labor, the owner of a 160-acre farm, valued by her and her witnesses at over \$1,500, subject to a mortgage of \$450, the rental value of the farm being about \$160 in 1902. *Held*, Claimant is not in necessitous circumstances within the meaning of the act of March 3, 1899, and her claim was properly rejected.

Hunter v. Hunter..... 136

14. Claimant, 54 years of age, is in the sole and undisputed possession and enjoyment of a homestead in the State of New York, valued at \$1,600; has \$50 in cash,

and has received from pensioner \$50 July 10, 1903, and \$20 September 16, 1903. The title to the real property, which is unencumbered, is jointly in claimant and pensioner, their interests being that of tenants by the entirety. Pensioner, 66 years of age, is not shown to be in possession of any means of support other than his interest in said homestead, his pension of \$12 per month, and the right to admission to a Soldiers' Home. *Held*, That claimant is not shown to be in necessitous circumstances within the meaning of the act of March 3, 1899.

Vogler v. Vogler..... 385

Practice.

15. Rule 10 of Practice before the Commissioner of Pensions, allowing ninety days in which to furnish evidence called for by the Bureau, is not applicable to cases for division of pension under the act of March 3, 1899. See Rules of Practice, of May 21, 1902, as amended by Order No. 69, of May 20, 1903, pars. 14 and 15. *Hyatt v. Hyatt* (14 P. D., 8). Claimant delayed for over thirty days to furnish the evidence called for by the Bureau, and made no application for extension of time. The rejection of her claim on the evidence then on file, which failed to establish her necessitous circumstances, within the meaning of said act, was not error. The evidence in this case fails to show that claimant is in necessitous circumstances, within the meaning of the act of March 3, 1899.

Bowman v. Bowman..... 120

16. Where claimant delayed for over two months to file the necessary evidence, called for by the Bureau, to establish her claim under the first proviso of the act of March 3, 1899, the rejection of her said claim will not be reversed because she has subsequently filed the evidence called for, her laches being unexplained, and no application for extension of time having been made to the Bureau. Claimant having failed to complete her claim, it was properly rejected under paragraph 15 of Order No. 69, approved May 20, 1903.

Washburn v. Washburn..... 127

17. Pensioner's sole assignment of error in his appeal is that the special examiner failed and refused to take the depositions of his eleven impeaching witnesses. *Held*, That said assignment is defective in that it fails to show that any application had been made to the Commissioner of Pensions for an examination of said witnesses, and refused by the Commissioner, and for the further reason that the appeal fails to allege that the testimony of the witnesses, sought to be impeached, was untrue. Appellant alleged no error before the special examiner, and took no exceptions to his rulings, and the question as to whether the examiner properly exercised his discretion in conducting the examination can not, against the objection of appellee, be permitted to be first raised on appeal. Neither claimant nor pensioner, in claims under the act of March 3, 1899, is entitled, as a legal right, to the services of a special examiner.

Buck v. Buck..... 150

18. Where claimant has filed a valid declaration under the first proviso of the act of March 3, 1899, with proof in support thereof sufficient to establish a prima facie case under the law, and no evidence is filed by pensioner after due notice of said claim, the rejection of her claim on the ground that she "has failed to furnish the evidence necessary to establish her title within the meaning of the act" is error. It is a rule of evidence, recognized and enforced by Federal and State courts generally, that a party attacking a duly established marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage must not only prove a valid prior marriage, but also that it has not been dissolved in any

manner at the time of the subsequent marriage, even though it involved the proving of a negative; that every presumption is in favor of the validity of the established marriage, and all these presumptions must be overcome by satisfactory, irrefragable proof, the burden of proof being upon the party attacking the marriage. Legal wifehood is established, *prima facie*, under act of March 3, 1899, by proof of marriage under the general rules of evidence applicable thereto, and claimants are entitled to the benefit of the presumptions in favor of marriage.

Wardwell v. Wardwell 234

19. Where a claim for division of pension based upon a declaration alleging six months' desertion, under the first proviso of the act of March 3, 1899, was properly rejected on the ground that the statutory desertion of six months was not established, and claimant was subsequently allowed a claim under a subsequent declaration based upon the second proviso of said act, the question of desertion was not in issue under said second declaration, and can not be considered on appeal. A declaration based upon the second proviso of the act of March 3, 1899, will not justify an allowance of a claim for division of pension under the first proviso of said act. Rule 16 of Practice does not, and was not designed to, deprive either party of the right of appeal after thirty days; but unless the appeal is filed within thirty days from the receipt of notice of the Bureau action, payments of pension made in accordance with such Bureau action will not be affected by the appeal, in the absence of fraud or mistake of fact.

White v. White 313

20. Prior to the adoption of any rules of practice governing appeal from Bureau actions in cases arising under the first three provisos of the act of March 3, 1899, and prior to departmental decisions in the case of *Ellis v. Ellis* (11 P. D., 288), pensioner filed an appeal, February 18, 1901, from the Bureau action of September 6, 1900, allowing his wife one-half his pension on the ground of his desertion of her. On August 27, 1901, he made due proof of service of a copy of his appeal upon the appellee. *Held*, That said proof of service was, in the absence of any rule of practice to the contrary, an amendment of his original appeal, *nunc pro tunc*, and constituted a valid appeal from the date of filing. Said appeal having been accepted and docketed as of the date of filing, the Bureau should have suspended payment to the wife of the one-half of the pension in controversy February 18, 1901, and pending the consideration of the appeal, and the continuation of the payment of one-half his pension to his wife subsequent thereto was error. Said appeal having been sustained by the Department, and the Bureau action of September 6, 1900, appealed from having been reversed March 18, 1902, on the ground that the evidence failed to show that pensioner had deserted his wife within the meaning of said act of March 3, 1899, he is entitled to a restoration of all pension money accruing subsequent to the last quarterly payment next preceding February 18, 1901, which may have been withheld from him. Pensioner having delayed for over five months to appeal from the Bureau action of September 6, 1900, he will be held to have waived his right to reimbursement of payments made the wife prior to his appeal, the Bureau having had complete jurisdiction of the claim on the part of the wife and the Bureau error being one of judgment or opinion merely, no error of law, fraud, or mistake of fact being involved.

Frederick W. Hyatt 367

21. The assignments of error in this case are general, not specific, as required by rule 19 of Practice, which requires that the appeal should briefly, but specifically, state the error of law or fact complained of and the grounds relied upon for

reversing or modifying the Bureau action appealed from. This is a rule of order and convenience based upon the recognized right of the appellee to actual notice of the appeal and information as to the grounds relied upon by the appellant for reversing or modifying the Bureau action. Good practice, as well as justice and fairness to appellees, the Bureau, and this Department, requires a compliance with the requirements of said rule in cases arising under the act of March 3, 1899. For noncompliance with said rule 19 of Practice, requiring specific assignments of error, the appeal is, on motion of attorney for appellee, dismissed. The defect in the appeal is not cured by the brief in this case.

Elliott v. Elliott 472

22. Claimant having left her husband and the matrimonial domicile, it is incumbent upon her to show by satisfactory evidence that she was legally justified in her said separation in order to establish marital desertion on the part of the husband. Claimant having submitted her domestic controversy to the courts, she is bound by their judicial decisions therein, no appeal having been taken therefrom. An unsworn petition can not be considered in the adjudication of claims for the division of pension under the act of March 3, 1899. The evidence in this case fails to establish desertion on the part of pensioner, as the separation appears to have resulted from domestic discord and a mutual desire for separation. Separation to constitute desertion must be against the will of the innocent party.

Burdette v. Burdette, alias Oakley 146

23. Pensioner having submitted the question of the validity of his marriage with claimant to a court of competent jurisdiction, he is bound by the final judicial determination thereof, no appeal having been taken therefrom. The evidence in this case fairly establishes the facts necessary to prove claimant's title to one-half her husband's pension under the first proviso of the act of March 3, 1899, viz, that she is the lawful wife of pensioner; that he had deserted her for over six months immediately prior to the date on which she filed her application under said act; that she is a woman of good moral character and in necessitous circumstances.

Morley v. Morley 230

DIVORCE.

See also DIVISION OF PENSION, 230, 521; MARRIAGE, 21, 99, 173, 265, 438, 497; RESTORATION, 111, 198, 411, 452.

Divorce—Decree—Record—Marriage—Evidence.

1. Soldier filed a libel for divorce against claimant. The record shows that the case came to trial, that the court found for the libellant, and ordered that a decree to that effect be prepared. No formal record of decree appears to have been prepared or filed. *Held*, That soldier was legally divorced from claimant, who is therefore not his widow, said divorce being effective by the order of the court alone and not affected by the lack of a formal record of decree, which is merely evidence of the order of the court, having no effect of itself.

Mary E. Noble (widow) 535

2. A divorce decree which shows upon its face the necessary jurisdiction, the record showing the necessary jurisdictional facts, and such decree being valid and binding in the State in which it was rendered, will be regarded as conclusive by this Department in the administration of pension affairs, provided that no fraud was perpetrated upon the court, directly or indirectly, for the purpose of affecting the pensionable rights of any person.

Melissa Boyd (widow) 279

DOMICILE.

See DIVISION OF PENSION, 479.

DRAFTED MAN.

See SERVICE, 63.

DROPPING.

See RESTORATION, 106, 128, 194.

ELECTION.

See ATTORNEYS, 269.

ENLISTMENT.

See SERVICE, 249.

EPILEPSY.

See DEATH CAUSE, 300.

ESTOPPEL.

See MARRIAGE, 438, 469.

EVIDENCE.

See also ADULTEROUS COHABITATION, 84; DEPENDENT PARENTS, 267; DISLOYALTY, 104; DIVISION OF PENSION, 159, 234, 334, 385, 479; DIVORCE, 535; LINE OF DUTY, 518; MARRIAGE, 156, 212, 288, 349, 355, 417, 428, 436, 438, 442, 456, 491, 497, 530, 537, 554; MARRIAGE AND DIVORCE, 17, 21, 290, 365; RESTORATION, 318, 411; SERVICE, 63, 298, 357, 388, 408.

Burden of proof—Joint.

1. The law presumes in favor of innocence in support of a duly established marriage, and the party attacking the validity of such a marriage on the ground that one of the parties to such a marriage was incompetent to contract the marriage by reason of a prior subsisting marriage must not only prove a valid prior marriage, but also prove that it had not been dissolved at the time of the second marriage, even though it involves the proving of a negative.

Willie v. Wilson, alias Willie..... 44

2. No burden of proof rests upon the Government, in an adjudication under section 2 of the joint resolution of July 1, 1902, to show a soldier received the bounty or gratuity referred to in that section; but the burden of proof rests alone, throughout said adjudication, upon the claimant to show to the satisfaction of the Commissioner of Pensions and the Secretary that said soldier did not receive such bounty or gratuity. A claimant, in seeking to establish this fact, should produce all obtainable evidence tending materially to show the facts, circumstances, and conditions as regards payment or receipt of such bounty or gratuity of the soldier's second enlistment, and competent testimony upon this point is that of comrades, officials, or ex-officials of the State, county, or municipality where such enlistment was made, or other persons who were in a position to have personal or record knowledge of the matter of such bounty or gratuity. A claim should not be rejected until the claimant has been called upon and given a fair opportunity to furnish such testimony. Whether the evidence in any case establishes the fact that the soldier did not receive such bounty or gratuity is a question of judgment on all such facts, circumstances, and conditions shown.

Catharine A., widow of Isaac P. Brown, alias Albert B. Cole..... 375

FAITHFUL SERVICE.

See SERVICE, 502, 552.

FEE.

See also ATTORNEYSHIP, 328.

Difficulty and trouble.

1. In a widow's claim for pension under the general law, a fee in excess of \$10 can not be paid an attorney for securing increase on account of a minor child, unless the prosecution of the claim, in the opinion of the Commissioner of Pensions, involves such difficulty and trouble as warrants him to allow a fee in excess of \$10, wherein articles of agreement are filed which he approves.

Mary A. Burns (claimant) 199

Disloyalty, joint resolution, July 11, 1902.

2. In claims for pension under the act of June 27, 1890, in which payment of pension has been barred by the provisions of section 4716, Revised Statutes, United States, where an attorney is the first, subsequently to the passage of the joint resolution of Congress of July 1, 1902, to cooperate with the claimant in the prosecution of a case in which he has been properly authorized so to do, such attorney may have title to the fee.

William P. Taylor (claimant) 276

Renewal of pension—

3. A fee in excess of \$2 can not be certified to an attorney for his service in securing renewal of pension under the act of June 27, 1890, from date of holding medical examination, at a higher rate than was formerly allowed to the claimant under said act, the necessary service constituting but a claim for increase under the act of June 27, 1890.

Isaac Walker (claimant) 256

FLORIDA LAWS.

See MARRIAGE, 383.

FORFEITURE.

See ATTORNEYSHIP, 172.

FRAUD OR MISTAKE.

See also RESTORATION, 141, 318.

Reimbursement.

It appearing from the evidence of the experts that soldier's disease of eyes for which he was pensioned was due to gonorrheal ophthalmia, for which reason his name was dropped from the roll, the rejection of his claim for restoration of pension was proper; but as it does not appear that soldier knew said disease of eyes was due to said cause when he was prosecuting his claim for pension, but had good reason to believe it due to a severe cold, he was not guilty of fraud in obtaining the allowance of said pension, and the action withholding his pension granted under the act of June 27, 1890, to reimburse the Government for the money erroneously paid under the general law was error and is reversed.

Camden L. Hill 57

GRAY'S BATTALION.

See COMMENCEMENT, 420; INCREASE, 285.

GUNSHOT WOUND.

See PATHOLOGICAL SEQUENCE, 542.

HELPLESS MINOR.**Special act.**

The claimant's name having been placed on the rolls subject to the provisions and limitations of the pension law, by special act, she is entitled to the two dollars increase provided for in the third section of the act of June 27, 1890, if the minor on whose account claim is made is shown to be helpless. The evidence in the claim making out a prima facie case, the papers are returned for special examination and medical examination on the question of the minor's helplessness.

Mattie Graziani (widow) 331

HONORABLE DISCHARGE.

See SERVICE, 352, 552.

Special act.

The records of the War Department showing that claimant was honorably discharged from the service in the war with Mexico, the Commissioner of Pensions has no lawful authority to question such record, and must accept the fact as certified to him by the Secretary of War.

Thomas J. Morman 185

HUSBAND AND WIFE.

See DEPENDENT RELATIVES, 294.

ILLINOIS.

See DEPENDENT RELATIVES, 294.

ILLINOIS LAWS.

See MARRIAGE, 442.

IMPEDIMENT.

See ADULTEROUS COHABITATION, 242; MARRIAGE, 212, 310, 349, 355, 365, 417, 554.

IN ARREST AWAITING TRIAL.

See LINE OF DUTY, 213.

INCREASE.

See also COMMENCEMENT, 69; FEE, 256.

Act of March 19, 1886—Widows.

1. The claimant not having married the sailor prior to the passage of the act of March 19, 1886, or prior to or during the service in which the disability causing death was contracted, she has no title to the \$12 per month provided for therein.

Mary C. Herbert (widow) 95

Act January 5, 1897.

2. When a pensioner under the act of January 29, 1887, was allowed increase, under the act of January 5, 1893, from a date which was subsequently decided by the Department to have been erroneous in law, and he, pursuant to such decision, applied for arrears of increase from the proper date, as so decided by the Department, which was prior to that from which he was allowed such increase, and shows the existence, at the former date, of the same conditions in fact as to title to increase as existed at the latter date, such arrears should be allowed, notwithstanding.

standing such conditions do not, in the opinion of the present adjudicating officer, establish such title, the question being one of judgment, merely, on the evidence.

Garry W. Lynch 155

3. As claimant was not lawfully on the rolls at the time the act of January 5, 1893, was passed, he was not entitled to increase under its provisions.

Jasper N. Armstrong 285

INDIAN WARS.

See SERVICE, 13, 296, 408.

INSANITY.

See DIVISION OF PENSION, 191; PATHOLOGICAL SEQUENCE, 89.

INTENT.

See DIVISION OF PENSION, 191.

INTERLOCUTORY ORDER.

See PRACTICE, 364.

JOINT RESOLUTION OF JULY 1, 1902.

See DESERTION, 466; DISCHARGE, 380; DISLOYALTY, 422; EVIDENCE, 375; FEE, 276; SERVICE, 352, 502, 552.

JURISDICTION.

See DIVISION OF PENSION, 230; MARRIAGE AND DIVORCE, 173, 279.

KENTUCKY LAWS.

See LEGITIMACY, 474.

LEGITIMACY.

See also MARRIAGE, 428.

Kentucky laws—Slaves.

The claimant and the mother of the soldier contracted a valid slave marriage, but never ratified the same under the laws of Kentucky, the State in which they resided. *Held*, the laws of the State of Kentucky made the children of this slave marriage legitimate; and inasmuch as this claiming father could inherit from soldier, his legal status as a father is established. It is the *lex loci* which governs in such a case as the present one, wholly apart from the act of August 7, 1882, which has no bearing upon the issue herein involved. Opinion in the case of Gus Johnson, 8 P. D., 463, is hereby modified.

Patrick Chambers (father) 474

LENGTH OF SERVICE.

See MARRIAGE, 494.

LIMITATION.

See also DIVISION OF PENSION, 1; MARRIAGE AND DIVORCE, 265; SERVICE, 13.

Act March 3, 1879—Minors.

1. The words "children under sixteen years of age," as used in the exception to the proviso to section 2 of the act of March 3, 1879, mean children of the soldier on account of whose service and death pension is claimed, who were under

the age of 16 years at the time of his death, or at the date of the death or remarriage of his widow, and not to children who are under 16 years of age when they apply for such pension. Children of a soldier who were at any time prior to arriving at the age of 16 years entitled to pension on account of the service and death of their father from a cause arising in the service and in line of duty, by reason of the exception to the limitation contained in the proviso in section 2 of the act of March 3, 1879, may apply for and receive such pension even after arriving at the age of 16 years. (Citing cases of Caroline Fritsche, 8 P. D., o. s., 196; Secretary Teller's instructions, March 3, 1885; Thomas W. Baugher, 7 P. D., 433; James H. Hawksley, 6 L. B. P., 454; Cornelia A. Nyland, 3 P. D., o. s., 256; Eli Phipps, 8 P. D., 111.) Instructions (10 P. D., 465) overruled.

Minors of James F. Burkhead 24

Act March 3, 1879—Orphan brothers and sisters.

2. The proviso to the act of March 3, 1879, excepting from the limitation therein prescribed as to date of filing "claims by or in behalf of insane persons and children under 16 years of age" does not apply to claims of orphan brothers and sisters. Minor sisters of Alexander Sutton (8 P. D., 137); Lucy Hunt (9 P. D., 160); dependent sister of William A. Baker (*ibid.*, 504).

Mary C. Fleming, formerly Bassett (as minor sister) 489

LINE OF DUTY.

Absence from command.

1. It appearing from the evidence in this case that at the time this soldier lost his life by drowning he was absent from his command on a pass, attending a picnic party for his own pleasure and amusement, he was not in "line of duty" within the meaning and intent of those words as used in the pension laws, and his death under such circumstances confers no title to pension upon his minor child under the provisions of section 4702, Revised Statutes, and the decisions of this Department.

Minor of Anthony J. Brechbiel 114

Accidental injury.

2. The record shows that the soldier incurred the dislocation of his left arm, for which pension is claimed, while scuffling in the barracks and that he was not in line of duty.

Delbert H. Ensor 81

3. The soldier was wounded by the accidental discharge of a revolver while cleaning it in quarters, he not knowing that it was loaded. The Army Regulations prohibit the taking of loaded weapons to quarters, but it does not appear that he knowingly and willfully disobeyed regulations, or was guilty of culpable or gross negligence in handling the weapon. It is therefore held that the wound was incurred in line of duty.

Joseph Heimkel 203

4. The soldier was shot accidentally by a comrade whom he had pulled out of bed "in a playful manner." Held, That the wound was not received in the line of duty.

Addie F. Wilde (widow) 506

In arrest awaiting trial.

5. A disease contracted by soldier while in confinement awaiting trial for a breach of military duty is not necessarily incurred without the line of duty, and when the soldier is acquitted, or died while awaiting trial, a disease so contracted is held to have been incurred in line of duty.

Sarah Phillips, now Clark (widow) 213

Evidence—Origin.

6. The evidence showing that the claimant incurred a hernia of the right side while in the service, with a strong probability that it was incurred in the line of duty, it is held that whatever of doubt there may be as to origin in line of duty should be resolved in his favor.

Edward T. Courtney 518

Senile cataract.

7. A disability due to senile cataract is not pensionable under the general law as construed by the Attorney-General (7 Op., 149), because the same is not due to the service in line of duty.

Jeremiah Bowman 495

LOCOMOTOR ATAXIA.

See PATHOLOGICAL SEQUENCE, 542.

LOUISIANA LAWS.

See MARRIAGE, 344.

MAINE.

See MARRIAGE, 349.

MALARIAL POISONING.

See PATHOLOGICAL SEQUENCE, 542.

MARRIAGE.

See also ADULTEROUS COHABITATION, 242, 362; DIVORCE, 535; DIVISION OF PENSION, 177, 230, 234; LEGITIMACY, 474.

Divorce—Decree—Jurisdiction.

1. A divorce decree which shows upon its face the necessary jurisdiction, the record showing the necessary jurisdictional facts, and such decree being valid and binding in the State in which it was rendered, will be regarded as conclusive by this Department in the administration of pension affairs, provided that no fraud was perpetrated upon the court, directly or indirectly, for the purpose of affecting the pensionable rights of any person.

Melissa Boyd (widow) 279

Estoppel—Conduct.

2. A claimant who has for years sustained toward a man a de facto relation of marriage, claiming and professing to be his wife, acting as such, and has been so acknowledged by him and accepted by the public generally, is estopped from establishing a pensionable status by denying there was any marriage between them.

Jennette Thompson (widow) 469

Evidence.

3. It is a rule of evidence recognized and enforced by the State and Federal courts generally, that a party attacking a duly established marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage, must not only prove a valid prior marriage, but also that it has not been dissolved at the time of the second marriage, even though it involves the proving of a negative; that every presumption is in favor of the validity of the established marriage, and these presumptions must be overcome by satisfactory irrefragible proof, the burden of proof being upon the party attacking the marriage.

Strunk v. Button and Strunk 17

4. As soldier had a wife living from whom he had not been divorced at the time of his marriage to claimant, such marriage was null and void; and as soldier's first wife survived him, and neither ever having procured a divorce, there was no period of time when claimant and soldier could have been legally married, she is not his widow nor entitled to pension.
Maria White (widow) 21
5. The evidence in this case fairly shows that claimant was married to pensioner in Cook County, Ill., May 31, 1888; that he deserted her in 1896, and that she is a woman of good moral character and in necessitous circumstances. Pensioner contends that his marriage to claimant was illegal because he had previously married one Venelia C. Hart, from whom he was never divorced on his application, although admitting that he did not know whether she had obtained a divorce or was alive at the date of his marriage to and separation from claimant. The law presumes in favor of innocence in support of a duly-established marriage, and the party attacking the validity of such a marriage on the ground that one of the parties to such marriage was incompetent to contract the marriage by reason of a prior subsisting marriage, must not only prove a valid prior marriage, but also prove that it had not been dissolved at the time of the second marriage, even though it involves the proving of a negative.
Willie v. Wilson, alias Willie 44
6. The proof of the due and formal celebration, in the State of Texas, of the marriage of this claimant, an African or of African blood, to the soldier herein raises the presumption that he also was an African or of African blood, the statutes of that State making miscegenation a criminal offense, and prima facie establishes the validity of their marriage, which is not overcome by the evidence herein tending to show he was not of such blood.
Charlotte Gamble (widow) 156
7. The fact that claimant, prior to her marriage to the soldier, lived for nineteen years with one Burch in the relation of husband and wife and bore him six children, coupled with the fact that they separated and each thereafter married again, and testimony showing that the agreement between Burch and claimant was that they should live together as husband and wife so long as they could agree, is not sufficient to establish a common-law marriage.
Annie L. Tripp (widow) 242
8. As the marital relations of claimant's mother and the soldier did not continue up to the time of the latter's enlistment, she can not be deemed the lawful child of the said soldier under the provisions of section 4705, Revised Statutes.
Adeline Andrews (minor) 288
9. The claimant obtained a decree of nullity out of a court of competent jurisdiction, the effect of which was to annul the second marriage ab initio and restore her to her status as the widow of the soldier; and there is an utter absence of any fraud on the part of either party to the decree. *Held:* This Department has no warrant in pension claims, and in the absence of fraud against the Government to question the soundness of the judgment of a court of competent jurisdiction as to a question of fact, said judgment being a part of the evidence in such claim. The decree of nullity in this case is accepted as conclusive as to the facts and law therein recited.
Hannah A. Rumsey (widow) 290
10. The evidence clearly shows that the marriage between claimant and Parsons was consummated when Parsons had a living and undivorced wife, and, under the facts in evidence, no common-law marriage could possibly have sprung into existence after the death of said wife. The marriage with Parsons was void

ab initio, and claimant's status is the same as if no marriage had ever taken place between herself and Parsons.

Emma A. Morrill (widow) 310

11. The evidence shows the claimant remarried at some time after the soldier's death, but fails to show when such marriage was contracted. Her claim, therefore, must stand rejected for lack of proof of a material fact as to her pensionable status, viz., the date of said remarriage.

Christie Ann Thompson as widow of Lewis Robinson..... 436

12. Soldier, about 1856, married Catherine Vernon, from whom he was separated, but without divorce, in 1857, when she left the State of Illinois, where the parties resided, for Missouri. She was never afterwards heard of, except by general rumor to the effect that she died in 1860. In 1869 he married the claimant by ceremony. *Held:* That under the decisions of the supreme court of Illinois presumption of death of Catherine attaches in favor of the validity of the soldier's marriage to the claimant, who is therefore his widow.

Eliza Breezley (widow) 442

13. Soldier married Elizabeth P. Osman, about 1855, with whom he lived until she ran away with one Welch, while soldier was in the service. Elizabeth has been unheard of for many years. Soldier married claimant in 1868, and they lived together as man and wife continuously until his death, in July, 1897. While no divorce between soldier and Elizabeth has been shown by primary evidence, yet under the decisions of courts in Missouri, where these parties resided, a divorce will be presumed in favor of the validity of the second marriage. (See case of Letitia C. A. Spencer, 13 P. D., 68.) Case of Theresia Schreve (9 P. D., 78) overruled.

Annie P. Ryerson (widow) 497

California.

14. Appellant's claim was rejected on the ground that her son, the sailor, left a widow surviving him, who is now a pensioner. Sailor was married to Lola B. Worth at Pasadena, Cal., March 7, 1898. She had previously been married, but her husband procured a divorce from her in Cook County, Ill., on November 20, 1897, three months and fifteen days prior to her marriage to sailor. An amendment to the California code, passed in 1901, provided that the subsequent marriage of any person during the lifetime of a former husband or wife is illegal and void from the beginning, unless "the former has been annulled or dissolved by a decree entered at least one year prior to such subsequent marriage; unless such former husband or wife was absent or was generally reputed * * * to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal." *Held:* That as it does not appear that the marriage referred to was ever annulled by a court of competent jurisdiction, the presumption is that sailor left a lawful wife surviving him; that as the limitation prescribed by the California code was not enacted until after the marriage in question, the same has no application thereto.

Bridget Shay (mother) 265

Connecticut.

15. There is record evidence of claimant's marriage to the soldier on December 17, 1868, in the State of Connecticut, and it is shown that the parties lived and cohabited together as husband and wife thereafter until soldier's death six years later. Claimant admits a prior marriage many years ago, but swears that said first husband went away and never returned, and she was informed about the close of the war that he was dead, a newspaper notice of his death having been read to her. Under the laws of Connecticut, a marriage being proved by competent

evidence, the law raises a presumption in favor of its legality, and such previous marriage did not cast the burden upon the claimant of proving either that the former husband was dead or, if living, that a legal divorce had been granted.

Eliza Boazman (widow) 355

Delaware.

16. Claimant and soldier lived together from a date subsequent to the civil war to about the years 1897 or 1898, when they were married by a ceremony. Some positive act or ceremony is necessary to render valid a marriage contract in the State of Delaware. Revised Code State of Delaware, chapter 74, section 2: *Jackson v. Benjamin Collins* (2 Houston, 128); *State v. Miller* (3 Pennewill, 518).

Frances Hopkins (widow) 527

Florida.

17. The slave marriage between claimant and sailor was of no force or effect under the laws of Florida, where they resided, there having been no cohabitation between them after their emancipation.

Bettie Rankins (widow) 383

Illinois.

18. Soldier, about 1856, married Catherine Vernon, from whom he was separated, but without divorce, in 1857, when she left the State of Illinois, where the parties resided, for Missouri. She was never afterwards heard of, except by general rumor to the effect that she died in 1860. In 1869 he married the claimant by ceremony. *Held:* That under the decisions of the supreme court of Illinois presumption of death of Catherine attaches in favor of the validity of the soldier's marriage to the claimant, who is therefore his widow.

Eliza Breezley (widow) 442

Louisiana.

19. Claimant and soldier commenced to live together by common consent about the year 1882, and were married by ceremony in 1891. *Held:* A marriage by ceremony is necessary in the State of Louisiana (Civil Code of Louisiana, art. 91; *Holmes v. Holmes*, 6 La., 463; *Powers v. Executors*, 35 La. An., 630; *Blasini et al. v. The Succession*, 30 La. An., 1368). That part of the opinion in the case of *Francoise Gabriel* (12 P. D., 382) which holds a ceremony not to be essential is hereby expressly overruled.

Maggie Davis (widow) 344

Maine.

20. The evidence shows that claimant's marriage to the deceased sailor was invalid, as he then had a living wife, and that claimant knew, or was in possession of facts that would cause a reasonably prudent person to ascertain, that such marriage would be void. The consequent cohabitation was, therefore, meretricious as well as adulterous. *Held:* That in Maine cohabitation under the form of marriage, meretricious at its outset, still remains so after the removal of an existing impediment, unless a new contract is entered into. Continued cohabitation will not afford a legal presumption of a subsequent marriage.

Abbie M. Manson (alleged widow) 349

Maryland.

21. The evidence shows that claimant married soldier September 26, 1901. This was after the passage of the act of June 27, 1890, and therefore, according to the provisions of said act, she has no pensionable status under the same, the law of Maryland not recognizing marriages without religious ceremony.

Nancy Byrd (widow) 347

22. No record of the marriage of claimant and soldier, nor of a license to marry can be found, but claimant swears that they were secretly married in Baltimore, Md., by a Methodist minister, according to the Methodist ceremonial rites, and the soldier in his lifetime deposed before a special examiner that he and claimant were married by a minister named Smith, in Baltimore, Md. The evidence shows that immediately thereafter they announced to their family and friends that they were married, and within a week of the date of the alleged marriage soldier and claimant commenced housekeeping and lived and cohabited together as husband and wife, and were so recognized by their relatives and acquaintances from that time until soldier's death: *Held*: That under the decisions of the Maryland court of appeals which hold that "where parties live together ostensibly" as husband and wife "and are received into society and treated by their friends and relations as having and being entitled to that status, the law will presume * * * that they have been legally married," claimant is the widow of the deceased soldier.

Amelia K. Shanaman (widow) 530

Massachusetts.

23. A common-law marriage, i. e., a contract per verba de presenti, no third party participating as a magistrate or minister or one believed to be such by the parties, neither of whom is a Quaker, is not a valid marriage in Massachusetts. (Overruling case of *Emma C. Sanders*, 11 P. D., 114.) General repute or cohabitation of the parties as married persons is evidence by which a marriage, validly contracted, may be proved.

Mary E. Draper (widow) 456

24. A divorce nisi in Massachusetts does not dissolve the marriage relation. Until the decree is made absolute, coverture continues. Absolute divorce, after the expiration of six months from rendition of decree nisi, is not in the nature of a decree nunc pro tunc; coverture for any purpose, except cohabitation, is not terminated at any time prior to decree absolute. A claim for restoration under the act of March 3, 1901, executed during the term of a decree nisi, is invalid. Presumption of death attaches in Massachusetts as at common law. Where an allegation of death of a spouse, insusceptible of proof by primary evidence, is followed by the filing of a libel for divorce, based upon desertion of said spouse, libellant is not afterwards estopped from invoking presumption of death; but the allegation in the libel may be considered as evidence upon the question of rebuttal of presumption.

Ruth A. Pitkin as widow of Carlos R. Bugbee 438

Michigan.

25. Claimant married soldier, by ceremony, on March 21, 1869, cohabiting with him as his wife, in the State of Michigan, till his death on March 28, 1899. She had previously, when probably under age, married one Townsend, and it is also probable Townsend had at the time a living undivorced wife. Townsend died December 25, 1875. *Held*: Under the statement of fact a marriage between claimant and soldier must be presumed. (*Barker v. Valentine*, 125 Mich., 336.) The opinion in the case of *Harriet Comstock* (10 P. D., 220), so far as it conflicts with the holding in the case of *Barker v. Valentine*, is hereby expressly overruled.

Jennie Atherton (widow) 554

Mississippi.

26. Widow was formally married to soldier in 1870 in Mississippi. Prior to that date she cohabited for some time with one Shaw, with whom she was living at the time of the adoption of the constitution of that State, December 1, 1869.

The evidence does not show a matrimonial intention characterizing her cohabitation with said Shaw. *Held:* That the effect of article 12, section 22, of said constitution was not to force the marital estate upon those not intending it, albeit they were cohabiting like husband and wife on the date of its adoption. Her relations with Shaw not being matrimonial, she had full capacity to contract the marriage with soldier and is, therefore, his widow.

Amanda Taylor, now Robinson, (widow) 476

Missouri.

27. A slave marriage was absolutely void in Missouri unless ratified subsequent to emancipation of the parties. The question of ratification of such a marriage is one of fact, to be determined from all the facts, circumstances, and conditions in the case, as shown by the evidence.

Minors of John Bluford 491

28. Soldier married Elizabeth P. Osman about 1855, with whom he lived until she ran away with one Welch while soldier was in the service. Elizabeth has been unheard of for many years. Soldier married claimant in 1868, and they lived together as man and wife continuously until his death in July, 1897. While no divorce between soldier and Elizabeth has been shown by primary evidence, yet under the decisions of courts in Missouri, where these parties resided, a divorce will be presumed in favor of the validity of the second marriage. (See case of Letitia C. A. Spencer, 13 P. D., 68.) Case of Theresa Schreve (9 P. D., 78) overruled.

Annie P. Ryerson (widow) 497

New York.

29. The claimant and soldier were married by ceremony in the State of New York June 7, 1868, and they lived together in that State as man and wife until April 8, 1896, when the soldier deserted her. He applied for and obtained a divorce from claimant on November 6, 1891, while in the State of Wisconsin, on the ground of desertion, and on August 2, 1892, he married one Lillian Gridley, the ceremony being performed in the State of Wisconsin. The claimant resided in New York at the time said divorce was granted, was not served with process, and made no appearance at the trial and authorized no defense. *Held:* That the courts of New York having decided that a divorce obtained in another State against a citizen of New York, in an action where there was no personal service of process within the former State and no personal appearance in the action by the defendant, is void in the State of New York, and does not change the status of the defendant in the jurisdiction of the State of New York, this claimant is therefore held to be the legal widow of the soldier.

Mary J. Marshall (widow) 173

30. The evidence fails to show the claimant's marriage to the soldier, contracted while she had a former husband living and undivorced, was contracted by her in entire good faith as to her former husband, as required by the statute and decisions of the courts of New York, and such marriage was, therefore, invalid and void, and she is not the soldier's widow.

Annu F. Cummings (as widow) 365

Ohio.

31. A common-law marriage may arise in the State of Ohio after the removal of an impediment, the lawfulness of said marriage being based not upon a new contract as a fact in evidence, but upon a presumption that a new contract was entered into. The marital status in pension cases must be determined by the law of the State in which the marriage was consummated or according to the laws of the State in which the claim arises. A marriage under a certain state of facts being lawful in one State, it does not follow that a marriage in another

State under an equivalent state of facts is a lawful one (act of August 7, 1882). The legitimacy of a child for pensionable purposes is to be determined by the marital status of its parents under the act of August 7, 1882, or under section 4704, Revised Statutes. A State statute as to legitimacy of children has no force in pension claims. Opinions in cases of minors of Perkins (13 P. D., 414) and of Plount (13 P. D., 541) overruled. Opinion in case of minors of Pulver (10 P. D., 227) reinstated.

Minor of Edward Plount..... 428

Pennsylvania.

32. At the time of the marriage of claimant to soldier said soldier had a wife living from whom he had not been divorced. Said marriage was therefore void and cohabitation thereunder illicit. Marriage will not be presumed from cohabitation, when the relation between the parties was of illicit origin, in the absence of proof of a subsequent actual marriage.

Annie E. Laraway (as widow)..... 212

33. Claimant was married to the deceased soldier in Michigan in 1887. The evidence shows that prior to that time, from 1862 to about 1870, in the State of Pennsylvania, the soldier cohabited with one Anna Maria, and that four children were born to them during that period. There is no evidence that an actual marriage was entered into, and the cohabitation ceased without legal separation. Both remarried, and all the facts and circumstances indicate that no contract of marriage was made. Under the facts in this case a marriage contract will not be presumed. The soldier, therefore, was competent to enter into a contract of marriage at the date he married claimant.

Mary Schilling (widow)..... 417

South Carolina.

34. While slaves, in South Carolina, lacked civil capacity to effect a marriage in its contractual sense, still there was a distinction between a "moral marriage," entered into with the master's consent, and an illicit and unlicensed sexual connection. The act of December 21, 1865, did not pretend to institute a new relation between slaves cohabiting as husband and wife, but merely "established" (i. e., confirmed or ratified) a marriage relation previously existing, lacking only the element of contractual capacity for its perfect consummation. Where slaves, between whom a moral marriage with the consent of the owner had been perfected prior to emancipation, were living together as husband and wife on December 21, 1865, the moral marriage was ratified and established, with all the civil effects of a marriage duly celebrated between freemen. But the evidence must point unmistakably to a prior existing moral marriage as distinguished from an unauthorized and illicit connection between the parties.

Celia Robinson (widow)..... 537

Texas.

35. The proof of the due and formal celebration, in the State of Texas, of the marriage of this claimant, an African or of African blood, to the soldier herein raises the presumption that he also was an African or of African blood, the statutes of that State making miscegenation a criminal offense, and prima facie establishes the validity of their marriage, which is not overcome by the evidence herein tending to show he was not of such blood.

Charlotte Gamble (widow)..... 156

Utah.

36. The act of Congress approved June 23, 1874, conferred jurisdiction upon the probate courts of the Territory of Utah in divorce matters. The act of the Territorial legislature of Utah approved March 6, 1852, gave the probate courts of said

Territory jurisdiction in divorce matters, and such act was in force August 10, 1876. On said last-mentioned date the probate court of Boxelder County, Utah, issued a decree of divorce between claimant and the soldier herein, which divorce decree is valid upon its face. *Held*, The said probate court having jurisdiction, and the decree being valid on its face, all statutory requirements and orders of the court having been strictly fulfilled, the claimant was regularly divorced from the soldier and is consequently not his widow.

Mary E. Smedley (widow) 99

Virginia.

37. The appellant and soldier began living together in the State of Virginia some time during the year 1867, where they continued to live and cohabit as husband and wife until the date of his death, which occurred August 4, 1890, but were never married under a license or by any ceremony. *Held*, That, under the laws of the State of Virginia, where a common-law marriage is not valid, claimant and soldier were never lawfully married, and, therefore, she is not his legal widow and has no pensionable status under the act of June 27, 1890.

Peggy Churn (alleged widow) 445

West Virginia.

38. Claimant married soldier by ceremony while he had living an undivorced wife. A divorce was obtained from soldier by the first wife three months after he married claimant. No further marriage took place between soldier and claimant after the impediment was removed. *Held*, Claimant is not the widow of soldier. Common-law marriages are invalid in the State of West Virginia if contracted in said State. (*Beverlin v. Beverlin*, 29 W. Va., 723.)

Mazilla Lester (as widow) 38

MARYLAND LAWS.

See MARRIAGE, 347, 530.

MASSACHUSETTS LAWS.

See MARRIAGE, 438, 456.

MATERIAL SERVICE.

See ATTORNEYS, 273.

MEANS OF SUPPORT.

See DEPENDENCE, 4, 80; DEPENDENT PARENTS, 267.

MEDICAL EXAMINATIONS.

Order 74.

The rate of pension now received by the claimant (\$8) appears proportionate to the degree of inability shown for earning a support by manual labor. Some discretion as to the frequency and propriety of ordering medical examinations of claimants is properly vested in the Commissioner of Pensions as prescribed by order No. 74, approved October 21, 1903.

Oliver S. Whitehurst 450

MEXICAN WAR.

See COMMENCEMENT, 40, 420.

MICHIGAN LAWS.

See MARRIAGE, 554.

MINORS.

See DECLARATION, 7; LIMITATION, 24.

MISSISSIPPI LAWS.

See MARRIAGE, 476.

MISSOURI LAWS.

See MARRIAGE, 491, 497

MISTAKE.

See REIMBURSEMENT, 152.

MORAL CHARACTER.

See DIVISION OF PENSION, 177, 338.

MUSTER.

See SERVICE, 249.

NAVAL HOME.

See DIVISION OF PENSION, 1.

NAVY PENSION.

See DIVISION OF PENSION, 1.

Reimbursement.

The Commissioner of Pensions has no lawful power to direct recovery, from a subsequent allowance certified to him by the Secretary of the Navy under section 4757 of the Revised Statutes, of any part of a similar allowance previously certified to him by said Secretary of the Navy and already paid by him, notwithstanding the Secretary of the Navy has, since the final payment of said first allowance, certified that he has reduced it and requested payment at the reduced rate; but where the Secretary of the Navy makes such certificate and request, as to a reduction of the rate, before action by the Commissioner of Pensions upon the first certificate authorizing payment at the rate from which reduced, the Commissioner should follow the later certificate and request, and should pay only the reduced rate.

James R. Bell..... 224

NECESSITOUS CIRCUMSTANCES.

See DIVISION OF PENSION, 136, 385.

NEGLECT.

See ATTORNEYS, 172, 228.

NEGLIGENCE.

See LINE OF DUTY, 203.

NEW EXAMINATIONS.

See MEDICAL EXAMINATIONS, 450.

NEW YORK LAWS.

See MARRIAGE AND DIVORCE, 173, 365.

NULLITY.

See MARRIAGE AND DIVORCE, 265.

OHIO LAWS.

See MARRIAGE, 428.

ORDER NO. 74.

See MEDICAL EXAMINATIONS, 450.

ORIGIN.

See LINE OF DUTY, 518.

ORPHAN BROTHERS AND SISTERS.

See LIMITATION, 489.

PARDON.

See SERVICE, 352.

PATHOLOGICAL SEQUENCE.**Gunshot wound, malarial poisoning, and disease of spine.**

1. This claimant's disease of the spinal cord being, under the evidence and medical authorities cited, of uncertain diagnosis and etiology, but a disease which, however diagnosed, may, under said medical authorities, be possibly due pathologically to one or more of the causes on account of which he is pensioned, and other possible causes of such disease being shown by the evidence not to exist or to have existed, a pathological connection between said disease and said causes on account of which he is pensioned should be held to be sufficiently established in his claim for increase on account of said disease alleged as such result. A medical sequence need not more than any other fact be established beyond all doubt, but a reasonable probability from all the facts, circumstances, and conditions shown that a certain pathological relationship exists in the case is sufficient. In determining the question of such probability the opinions of the medical division of the Pension Bureau are only advisory to and not binding upon either the Commissioner of Pensions or the Secretary, whose sole and exclusive province it is to decide all such questions for themselves upon the entire evidence, such opinions, and medical authorities. Reopening of a rejected claim for increase upon affidavits filed more than ninety days after notice of such rejection is proper under the Rules of Practice, and such affidavits may not properly be considered on appeal as to the merits of said rejection.

George W. Wheeler 542

Catarrh and bronchitis.

2. Chronic nasopharyngeal catarrh was the only existing affection of the respiratory organs, and bronchitis is not accepted as a result thereof, but rather the result of disease of heart. Under the evidence and the practice of the Bureau the approval for disease of the respiratory organs was too broad and not warranted.

William H. Carr 201

Insanity and sunstroke.

3. The existing insanity, first positively shown in 1883, was not a result of sunstroke, as alleged, which occurred in 1862. The present rate of pension is adequate for the pensioned disabilities.

John B. Shafer (insane) 89

PENNSYLVANIA LAWS.

See MARRIAGE, 212.

PERMANENT AND SPECIFIC.

See DISABILITY, 182; Rates, 508.

POWER OF ATTORNEY.

See ATTORNEYSHIP, 186.

PRACTICE.

See also ATTORNEYS, 83, 172, 289, 328; BOUNTY LAND, 415; DECLARATIONS, 426; DIVISION OF PENSIONS, 120, 127, 150, 234, 313, 367, 472; EVIDENCE, 375; PATHOLOGICAL SEQUENCE, 201; RERATING, 215.

Brief-face—Combined rates.

1. In 1887, at a time when the soldier was pensioned for "gunshot wounds of left leg and right thigh," he filed a claim for increase on account of additional disabilities, namely, "disease of eyes and disease of spine." Pursuant to these allegations, additional pension for "disease of back (lumbago)" at \$2 per month, and for "disease of eyes" at \$4, \$8, and \$17, respectively, per month was allowed. The combined rates, however, did not exceed \$17 per month. Fractional rates can not be added together so as to make a grade rate, and the aggregate degree of disability shown to be due to all pensioned causes was not equivalent to the loss of a hand or foot, for purposes of manual labor; consequently the third-grade rate was not allowed. Although the term "disease of eyes" is not so indefinite as are such terms as "disease of spine," "disease of head," "disease of back," etc., the visual organs and their appendages are, nevertheless, subject to so large a number and such an infinite variety of diseases, accidents, and other abnormal conditions that it is desirable that all approvals for pension—both legal and medical, especially the latter—hereafter spread on the brief-face in each and every case wherein such questions are involved shall indicate as clearly as possible the nature of the disease, lesion, or condition accepted as of service origin; but inasmuch as this suggestion is in the nature of a new departure from prevailing methods, the propriety of complying therewith is, at this time, merely suggested for the careful consideration of the Bureau, the action of which in other respects in this case, especially in regard to the adequacy of the existing rate, is approved.

William Hanley..... 162

Interlocutory order.

2. An appeal will not lie from an interlocutory order or ruling. Cases of John W. Morris (2 P. D., 73) and Frank Bishop, jr. (8 P. D., 459).

George P. Robertson..... 364

Pathological sequence.

3. Chronic nasopharyngeal catarrh was the only existing affection of the respiratory organs, and bronchitis is not accepted as a result thereof, but rather the result of disease of heart. Under the evidence and the practice of the Bureau the approval for disease of the respiratory organs was too broad and not warranted.

William H. Carr..... 202

Reconsideration—Rule 13.

4. The action of the Bureau in the case having been affirmed on appeal and a motion for reconsideration of said decision overruled, this second motion to reconsider is overruled under rule 13, Rules of Practice, as the same does not disclose that

any material feature of the case had not been fully considered nor that there was error of fact or in the application of the law.

Henry C. Mechling 68

Rejection.

5. A claim should not be rejected until the claimant has been called upon and given a fair opportunity to furnish such testimony. Whether the evidence in any case establishes the fact that the soldier did not receive such bounty or gratuity is a question of judgment on all such facts, circumstances, and conditions shown.

Catharine A. Brown 376

Special examination.

6. Where, after a special examination, directed by this Department, after appeal, a claim for division of pension under the act of March 3, 1899, has been decided by the Department, the decision will be deemed final to the extent that, in the absence of fraud or mistake, it will not be reopened or modified without the express direction of the Secretary of the Interior. The Bureau action, in declining to recommend a reopening of this case, and holding that there was no reason to believe that the special examination was partial or prejudicial to the interests of claimant, and that further action by the Bureau was not deemed necessary or desirable, is affirmed.

Hyatt v. Hyatt 8

PREDISPOSING CAUSE.

See DEATH CAUSE, 300.

PRESUMPTIONS.

See MARRIAGE, 156, 497, 530.

PRESUMPTION OF DEATH.

See MARRIAGE, 442.

RATE.

See AMPUTATION, 264; DISABILITY, 182; PATHOLOGICAL SEQUENCE, 89; PRACTICE, 162.

Specific disability—Act March 2, 1903.

1. Claimant having been pensioned at the rate of \$24 per month from the passage of the act of March 3, 1883, for gunshot wound of right thigh and resulting paralysis of leg and foot, resulting in total disability such as to render incapacity to perform manual labor equivalent to the loss of a hand or a foot, he must have been totally disabled in the leg and foot and entitled to the rate of \$40 per month provided by the act of March 2, 1903. The Bureau having conceded his right to the benefits of said act, the increased rate of pension must commence from the approval of the act.

Cornelius F. Groner 508

2. Those persons who are totally disabled in both feet are not included in any class of beneficiaries mentioned in the act of March 2, 1903, and are not entitled thereunder to a pension of \$100 per month.

Wilson S. Barney 524

RECOGNITION.

See ATTORNEYS, 228, 269, 273; FEE, 276.

RECONSIDERATION.

See PRACTICE, 68.

RECORD.

See DIVORCE, 535; SERVICE, 249, 298, 388.

REIMBURSEMENT.

See DIVISION OF PENSION, 367; FRAUD OR MISTAKE, 57; NAVY PENSIONS, 224.

Mistake—Accrued pension.

Where a pensioner's name is dropped from the rolls under the act of June 27, 1890, and payments of pension are continued through error on the part of a pension agent, the Government may reimburse itself for the money so paid out of the accrued pension in claim in behalf of said pensioner for renewal of pension under said act.

James Calhoun (deceased)..... 152

REMARRIAGE.

See MARRIAGE, 436; RESTORATION, 128, 194.

RENEWAL OF PENSION.

See FEE, 256.

REPUTATION.

See MARRIAGE, 469.

RE-RATING.

Acts of August 4, 1886, and March 2, 1903.

The claimant received the highest possible rating for his disability prior to June 6, 1886, and he was not entitled to a higher rating than he was receiving from August 4, 1886. A re-rating was therefore not warranted. The present rating, \$30 per month, was shown by the report of the last official examination to be adequate for the pensioned disability, gunshot wound of right thigh. The action advising the claimant that he is not entitled to the benefit of the act of March 2, 1903, as alleged, was error. He should have been afforded an opportunity to show that he was disabled in an increased degree, irrespective of said act. Final action should be taken on a face brief.

John W. Smith..... 215

RES JUDICATA.

See DIVISION OF PENSION, 146; RESTORATION, 141.

RESTORATION.

See also FRAUD AND MISTAKE, 57; MARRIAGE, 438.

Act March 3, 1901.

1. The act of March 3, 1901, does not relate to the divorce from any other than the husband on account of whom a widow's pension was terminated. Claimant having been legally divorced, on her own application and without fault on her part, from Artemus Bennett, on account of her marriage to whom her pension was terminated, she is entitled to be restored to the pension rolls, under the provision of said act.

Emaline S. Lamb, formerly Griswold (widow)..... 111

2. Claimant, a pensioner under the general law, was deprived of pension, and payment thereafter made to the guardian of the minor, under what is now section 4706, Revised Statutes, because she had abandoned the care and custody of

the said minor. She thereafter remarried, she claims the second husband is dead, and invokes the act of March 3, 1901. *Held:* The act of March 3, 1901, has no bearing whatever, either by implication or otherwise, upon the statute under which this claimant's pension was suspended; it relates only to the title and status of widows whose names have been dropped from the pension rolls because of their remarriage.

- Isabella Winfield (widow)* 128
3. Claimant's second husband secured a divorce from her on his application prior to the date of the passage of the act of March 3, 1901. The divorce subsequently secured on her own application is without force and effect and is not valid. Action affirmed.
- Laura A. Ingalls (widow)* 198
4. The act of March 3, 1901, relates only to the title and status of widows whose names have been dropped from the pension rolls because of their remarriage, and has no application to widows whose names were dropped under section 4708 of the Revised Statutes.
- Isabella Winfield (widow)* 194
5. The act of March 3, 1901, predicates title to restoration upon these conditions: (1) That claimant was the wife of soldier during his military service; (2) that pension had been allowed her under the provisions of the general law; (3) that her name was dropped from the roll on account of her remarriage; (4) that said remarriage has been dissolved by death, or by divorce "upon her own application and without fault on her part;" (5) that she is dependent within the meaning of the acts of June 27, 1890, and May 9, 1900. If these essential facts are shown affirmatively, the claimant "shall be entitled to have her name again placed on the pension roll," and it is error to adjudicate the claim *de novo*. In cases where the Commissioner of Pensions, in the exercise of his discretion, has passed upon given facts, has admitted the title of claimant to a pension, and has issued a certificate therefor, it is contrary to public policy for a successor in his office, the material facts being the same, again to place claimant's title in issue, unless there be newly discovered evidence of facts material to said issue, or evidence of fraud, or error in law, or plain mistake of fact—not mistake of judgment in matters involving the exercise of discretion on the part of an officer. Evidence, merely cumulative in its character, is not "newly discovered evidence" warranting the reopening of a claim.
- Sarah Mathers, formerly Miller (widow)* 318
6. The evidence shows that claimant secured a divorce from her second husband on her crossbill by a verdict of a jury and was awarded alimony. She therefore is entitled to restoration under the act of March 3, 1901, as it must be presumed the divorce was granted without fault on her part.
- Elizabeth Vallen, now Goshorn (widow)* 411
7. A claim for restoration under the act of March 3, 1901, executed during the term of a decree nisi, is invalid. Presumption of death attaches in Massachusetts as at common law. Where an allegation of death of a spouse, insusceptible of proof by primary evidence, is followed by the filing of a libel for divorce, based upon desertion of said spouse, libelant is not afterwards estopped from invoking presumption of death; but the allegation in the libel may be considered as evidence upon the question of rebuttal of presumption.
- Ruth A. Pitkin, as widow of Carlos R. Bugbee* 438
8. Claimant was dropped from the roll on account of her remarriage; and she was thereafter divorced from her second husband upon his own petition, the record showing competent jurisdiction. There are no indicia of fraud on the part of either party to the decree tending to show an attempt to defraud the

Government *Held*: Claimant has no status under the act of March 3, 1901
The fact that claimant's divorced husband died prior to the filing of the claim
for restoration does not give her title under the act of March 3, 1901.

Ellen A. Moer (widow) 452

Section 4719.

9. It is a satisfactory accounting, within the meaning of section 4719 of the Revised Statutes, of a pensioner's failure, for three years, to claim his pension, when it satisfactorily appears from the evidence that such pension had not legally terminated in some of the ways or for some of the causes specified, or by necessary implication included in the pension laws as terminating pension.

Eliza G. Brown (widow) 106

Fraud or mistake—Void marriage.

10. Appellant was pensioned under the general law from May 17, 1871, to February 16, 1874, when her name was dropped from the rolls because of her supposed marriage with one Gray. Subsequently the minors' application was rejected on the ground that the widow was still living, her marriage to Gray being declared null and void on the ground that he had a wife living and undivorced at the time of his pretended marriage to claimant. Whereupon the widow applied for restoration, but her claim was rejected on the ground that no record nor other satisfactory evidence showing origin of fatal disease, and no satisfactory evidence of the existence of the same at discharge or for a long time thereafter, and that claimant, though aided by special examination, had failed to establish the claim. *Held*, That claimant having once established her claim and having been allowed and paid the pension, that finding can not be legally set aside unless positive affirmative testimony is produced showing fraud, or that the testimony on which the claim was allowed was not true.

Eliza J. Eveland (widow) 141

RULE 13.

See ATTORNEYSHIP, 328; PRACTICE, 68.

RULE 16.

See DIVISION OF PENSION, 313.

SECTION 4698, REVISED STATUTES.

See COMMENCEMENT, 69.

SECTION 4702, REVISED STATUTES.

• See LINE OF DUTY, 114.

SECTION 4705, REVISED STATUTES.

See MARRIAGE, 288.

SECTION 4707, REVISED STATUTES.

See DEPENDENCE, 4; DEPENDENT RELATIVES, 267.

SECTION 4716, REVISED STATUTES.

See DISLOYALTY, 104, 422.

SECTION 4719, REVISED STATUTES.

See RESTORATION, 106.

SECTION 4757, REVISED STATUTES.

See NAVY PENSIONS, 224.

SENILE CATARACT.

See LINE OF DUTY, 495.

SEPARATION.

See DIVISION OF PENSION, 521.

SERVICE.**Absence.**

1. Where various reports of the War Department as to a soldier's service are conflicting or incomplete, a construction unfavorable to a claimant should not be placed upon such reports if, with an equal show of reason, they are susceptible of a construction favorable to claimant's interests. In determining the length and character of service rendered, within the meaning of the act of June 27, 1890, absence with leave should not be deducted unless it appears that the purpose of such leave was incompatible with the rendition of actual service. Where the record shows absence with leave, and the evidence does not indicate that during that period soldier was attending to his private business or devoting the time to his personal pleasure, the presumption attaches that the leave was granted for purposes consistent with the rendering of actual service within the meaning of the act of June 27, 1890.

Mary Dasher (widow) 257

Contract surgeons—Act June 27, 1890.

2. Acting assistant or contract surgeons were not, during the war of the rebellion, officers or enlisted men in or any part of the Army, and are not pensionable under the act of June 27, 1890.

Solomon F. Wehr 515

Desertion—Joint resolution of July 1, 1902.

3. The President having pardoned claimant for the offense of which he was convicted by a court-martial on condition that he reenlist in the same command and faithfully serve out such term of enlistment, and claimant having fully complied with such condition, the sentence of the court-martial was wiped out, including that part relating to a dishonorable discharge; and having been discharged by the order carrying out the President's pardon previous to his reenlistment, he was not dishonorably discharged by sentence of the court-martial, but honorably discharged by Order 141, War Department. Nothing appearing in the record suggesting that claimant's second service was not faithfully performed, it will be presumed that it was, and he accordingly comes within the provisions of the joint resolution of July 1, 1902, and the action of the Bureau rejecting his claim on the ground that his service under his last enlistment was not faithful is reversed.

Isaac Marvin 352

4. In establishing, under the joint resolution of July 1, 1902, a soldier's faithful entire last service, from which he was discharged, after removal of a charge of desertion, under the act of July 5, 1884, such discharge is not necessarily evidence of the faithfulness of such service; but when granted upon proof of faithful service to May 1, 1865, as provided in that act, and dated on the date so charged with desertion, such a record of desertion is prima facie evidence of unfaithfulness, and a claimant must produce evidence satisfactorily disproving such charge, and showing that such soldier did not, in fact, desert.

Fanny Stuart (widow) 502

5. Soldier had three terms of service, from the first of which he was never honorably discharged. His second term of service, from which he was honorably discharged, covered a period of about eight months. He was also honorably discharged from his third term of enlistment, after a service of four months and twelve days. "Last contract of service," the term employed in said resolution, must be taken in its literal sense. Consequently, soldier's last term of service being less than six months, he is excluded from the benefits of said resolution according to the terms of the proviso to the second section thereof.

John Veirs, alias William Dowell 552

Discharged without honor.

- 6.—The claimant having been discharged while in confinement at hard labor, under sentence of a court-martial, it is held that his discharge was not honorable, but "without honor," and that he has not a pensionable status under the act of June 27, 1890.

Peter Andrews 413

Drafted man—Act June 27, 1890.

7. It appearing from a report from the Auditor of the Treasury for the War Department, filed since this case was previously decided, that claimant's husband was drafted June 8, 1864, failed to report, was arrested September 12, 1864, and examined October 10, 1864, and rejected, it is held that he did not serve ninety days within the meaning of the act of June 27, 1890. The former decision in this case, reported in 13 P. D., 450, based on the evidence then in the case (the Chief of the Record and Pension Office having declined to furnish the above facts), is overruled.

Catherine Parcell (widow) 63

Enlistment and muster.

8. Claimant was pensioned under the act of June 27, 1890, but his name was dropped from the roll on November 9, 1901, on the ground that he was a rejected recruit and, therefore, not in the United States service as an enlisted man. Restoration to the rolls was refused on the ground that the records of the War Department show that claimant was not in the service of the United States. The records and the evidence taken on special examination show that he was in the service of the United States more than ninety days, having been enlisted June 13, 1862, and discharged to date from December 18, 1862.

Graham Thorn 249

Evidence—Record.

9. The claimant having made due proof of the number of days' service required by section 2 of the act of June 27, 1890, if he meets the other requirements of said act is entitled to a pension, notwithstanding the holding of the War Department that he is not regarded as having been in the military service of the United States.

Charles W. Parker 388

Indian wars.

10. "The act of June 27, 1902, extending the provisions, limitations, and benefits of the act of July 27, 1892, does not limit its benefits to those who served and were discharged under the immediate military authority of the United States only, but to those who served and were discharged under State, Territorial, or provisional authority as well." (See case of Lewis Lawley, 14 P. D., 13.) *Held*, That for pensionable purposes the roll on file in the Office of the Auditor for the War Department, showing the date and place of muster in and muster out, and that claimant served more than thirty days, is sufficient evidence of service to the Government of the United States, within the meaning of the terms of the act of June 27, 1902.

John L. Johnson 296

11. There is no record evidence to show that the claimant ever rendered the service alleged, or that he was paid for such service by the United States. Hence the Department is without authority to grant pension under the act of June 27, 1902.

Samuel T. Curtis..... 288

12. The evidence showing that soldier was paid for one month and twenty-five days' service, including twenty-nine days' travel pay, he is held to have been in the service of the United States for thirty days within the meaning of the act of July 27, 1892.

Margaret A. Davis (widow)..... 408

Termination of war of the rebellion.

13. It being shown that this soldier was accepted into the volunteer service in May, 1865, as under the authority of the act of Congress of July 17, 1862, "An act to suppress insurrection, etc., * * *" and that his enlistment was in Georgia, a State wherein the war of the rebellion yet, according to the President's proclamation of April 2, 1866, subsisted, such enlistment is established as one for the purposes of said war, and his service under it was presumptively war service and is pensionable service under the act of June 27, 1890. This particular presumption as to the character and purpose of his service outweighs the general presumption arising from the fact of the practical cessation of hostilities in July, 1865; and his service after July, 1865, should be presumed to have been of the same character and for the same purpose as that before that date, such service being shown to have been rendered in said State of Georgia, wherein, according to said proclamation, said war did not end until the date of said proclamation.

Annie Taylor (widow)..... 71

14. The termination of the war of the rebellion did not operate as a constructive discharge of volunteers enlisted during said war, as was the case of officers and men in the regular establishment, and the soldier or sailor upon whose service the application is based must be shown to have been honorably discharged from the final contract of service entered into by him during the war of the rebellion.

Placida M. de Ortega (widow)..... 326

15. Soldier enlisted April 14, 1865, and served in the State of Texas, where the rebellion had not been suppressed, and it is presumed that his service was rendered during the war of the rebellion. His widow is therefore entitled to pension under the act of June 27, 1890.

Mariah Smith (widow)..... 346

Teamsters—Act January 29, 1887.

16. There is no evidence, aside from the claimant's statements, that he rendered any service as an enlisted man in the Army of the United States during the war with Mexico. His service was as a teamster in the Quartermaster's Department, which is not a pensionable service under the act of January 29, 1887.

Allen J. Patrick..... 357

Travel pay.

17. Travel pay allowed the soldier to and from the point of rendezvous was not pay for actual military service, but was pay for time and expenses allowed recruits and discharged soldiers, and precludes their being considered as in actual military service during the time they were actually entitled to receive it.

Susan F. Alsop, alias Bean (widow)..... 494

SLAVES.

See LEGITIMACY, 474; MARRIAGE, 383, 436, 491, 537.

SOUTH CAROLINA LAWS.

See MARRIAGE, 537.

SPECIAL ACT.

See HELPLESS MINOR, 331; HONORABLE DISCHARGE, 195.

SPECIAL EXAMINATION.

See DIVISION OF PENSION, 338; PRACTICE, 8.

SPECIAL EXAMINERS.

See DIVISION OF PENSION, 150.

SPECIAL EXAMINER'S CONDUCT.

See ADULTEROUS COHABITATION, 219.

SPECIFIC DISABILITY.

See RATES, 508, 524.

SUBSTITUTION.

See ATTORNEYSHIP, 186.

SUCCESSION.

See BOUNTY LAND, 415.

SUNSTROKE.

See PATHOLOGICAL SEQUENCE, 89.

TEAMSTER.

See SERVICE, 357.

TERMINATION OF WAR OF REBELLION.

See SERVICE, 71, 326, 346.

TEXAS LAWS.

See MARRIAGE, 156.

TITLE.

See BOUNTY LAND, 415.

TOTAL DISABILITY IN A FOOT.

See RATES, 508.

TOTAL DISABILITY IN BOTH FEET.

See RATES, 524.

TRAVEL PAY.

See SERVICE, 494.

UTAH LAWS.

See MARRIAGE, 99.

INDEX TO DECISIONS.

VIRGINIA LAWS.

See MARRIAGE, 445.

VOID MARRIAGE.

See MARRIAGE AND DIVORCE, 310; RESTORATION, 141.

VOLUNTEERS.

See SERVICE, 328.

WAR WITH MEXICO.

See SERVICE, 357.

WEST VIRGINIA LAWS.

See MARRIAGE, 38.

WIDOWS.

See DEPENDENCE, 281; INCREASE, 95; MARRIAGE, 347.

WIDOW AND MINOR.

See FEE, 199.

WIDOW'S TITLE.

See MARRIAGE, 347.



